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No. 88-884

In The

Supreme Court of the United States

October Term, 1988

CAROLE KNEELAND, BELO BROADCASTING CORP., A.H. BELO CORP. d/b/a THE DALLAS MORNING NEWS, THE TIMES HERALD PRINTING CO. and DAVID EDEN,
Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION and SOUTHWEST ATHLETIC CONFERENCE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. Did the Court of Appeals violate and fail to apply Rule 52(a) of the Federal Rules of Civil Procedure by substituting its judgment for that of the district court and by rejecting the district court's findings of fact which supported its holding that Respondents are supported in part by Texas public funds and thus subject to the Texas Open Records Act. Petitioners assert that the district court's fact findings were supported by the evidence and would not have been rejected if the Court of Appeals had followed and applied the "clearly erroneous" standard of review required by Rule 52(a).

2. Did the Court of Appeals violate and refuse to apply 28 U.S.C. § 1652 which required the Court to follow controlling Texas law that athletic associations which receive funds for their general support from Texas public universities are subject to the Texas Open Records Act. Petitioners assert that the Court of Appeals not only refused to apply controlling Texas law but also relied on authority that had been expressly overruled and so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

NOTICE REQUIRED BY RULE 28.1

A. H. Belo Corporation is a parent corporation, all subsidiaries of which are wholly owned.

Belo Broadcasting Corporation is a wholly owned subsidiary of A. H. Belo Corporation.

The Times Herald Printing Company has no parent corporation or subsidiaries.

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No. 88-_____

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit in cause number 86-1825 was rendered on July 26, 1988. *Kneeland v. NCAA*, 850 F.2d 224 (5th Cir. 1988). An order overruling Petitioners' suggestion for rehearing *en banc* was rendered on August 25, 1988. *Kneeland v. NCAA*, 856 F.2d 191 (5th Cir. 1988). The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 52(a) provides:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds for its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of its evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

FED R. CIV. P. 52(a).

STATUTE INVOLVED

28 U.S.C. § 1652 provides as follows:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

Petitioners, who were plaintiffs and intervenors in the district court and appellees in the Court of Appeals, made requests of the National Collegiate Athletic Association ("NCAA") and the Southwest Athletic Conference ("SWC") under the Texas Open Records Act ("the Act"), TEX. REV. CIV. STAT. ANN. art. 6252-17a, for disclosure of information developed and maintained by the NCAA and the SWC in connection with their investigations of recruiting violations at Texas colleges and universities. When the requests were denied, Kneeland and Belo Broadcasting Corporation filed suit in Texas state court seeking mandamus ordering disclosure of the information, alleging claims under the Open Records Act, the first amendment to the United States Constitution and 42 U.S.C. § 1983. The NCAA and SWC removed the case to the United States District Court for the Western District of Texas pursuant to 28 U.S.C. § 1331. After a non-jury trial, which was handled by the district court in three stages, the district court rendered judgment for Petitioners that the NCAA and the SWC are subject to the Act and that certain documents must be released. The district court issued three opinions in this case. *Kneeland v. NCAA*, 650 F. Supp. 1047 (W.D. Tex. 1986); *Kneeland v. NCAA*, 650 F. Supp. 1064 (W.D. Tex. 1986); *Kneeland v. NCAA*, 650 F. Supp. 1076 (W.D. Tex. 1986).

The Texas Open Records Act applies to information held by a "governmental body," and that term is defined by the Act to include "the part, section, or portion of *every* organization . . . supported in whole or in part by public funds" of the State of Texas. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 2(1)(F) (emphasis added). The

district court held that the NCAA and the SWC are subject to the Act because they are supported in part by Texas public funds. *Kneeland v. NCAA*, 650 F. Supp. 1047 (W.D. Tex. 1986). Specific fact findings of the district court included findings that the NCAA and SWC receive public funds from their Texas public school members, *id.* at 1050-63, and the Court of Appeals affirmed this finding. *Kneeland v. NCAA*, 850 F.2d 224, 226-228 (5th Cir. 1988). Supporting this finding was evidence that the NCAA receives hundreds of thousands of dollars in funds from Texas public colleges and universities in the form of dues, television rights fees, revenue from championship events, and use of public employees and public property and that the SWC receives millions of dollars from Texas schools in the form of television rights fees.

The district court found that the NCAA and the SWC use the Texas public funds for their general support and expressly found that they do not provide the member institutions specific measurable services in return for a certain amount of money. *Kneeland v. NCAA*, 650 F. Supp. 1047, 1059-63 (W.D. Tex. 1986). Supporting this finding was evidence that the organizations use the public funds to pay their general expenses of operation and that the same services are provided to the member institutions, regardless of the amount paid by any institution. *Id.* The district court then applied controlling Texas authorities and held that the NCAA and the SWC are subject to the Act. *Id.* at 1057-63. After *in camera* inspection of the documents, the district court denied disclosure of many of the documents but ordered disclosure of the remaining documents, which related to illegal recruitment and the

furnishing of illegal inducements, including money, cars and prostitutes, to high school students by Texas college coaches, staff members, alumni and boosters. *Kneeland v. NCAA*, 650 F. Supp. 1076 (W.D. Tex. 1986).

The Court of Appeals reversed the judgment of the district court, although the appellate court upheld the finding that the NCAA and the SWC receive Texas public funds. *Kneeland v. NCAA*, 850 F.2d 224, 226-28 (5th Cir. 1988). The Court of Appeals, however, rejected the district court's fact finding that the NCAA and the SWC do not provide specific measurable services in return for a certain amount of money and reversed the judgment of the district court. *Id.* at 229-31. Petitioners filed a suggestion for rehearing *en banc*, which was joined by the State of Texas as *amicus curiae*,[1] but the Court of Appeals denied the motion without opinion. *Kneeland v. NCAA*, 856 F.2d 191 (5th Cir. 1988).

ARGUMENT

The Court of Appeals Failed to Apply Rule 52(a)

The Court of Appeals erred when it rejected the district court's finding that the NCAA and the SWC do not provide specific measurable services in return for a cer-

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[1] In its *amicus curiae* brief, the State, speaking through its Attorney General, informed the Court of Appeals that the Court had failed to follow an Attorney General opinion which construed the Act's definition of "governmental body" as applied to a private organization and that the Court had followed another Attorney General's opinion which had been expressly overruled.

tain amount of money and rejected the fact findings which supported the district court's ultimate fact finding that the NCAA and the SWC are supported in part by public funds of the State of Texas. By rejecting the fact findings merely because it disagreed with them, the Court of Appeals not only failed to apply the "clearly erroneous" standard of review required by Rule 52(a) but also reversed fact findings that were correct, were supported by the evidence, and were not clearly erroneous. The decision of the Court of Appeals in this case is in direct conflict with this Court's decision in *Anderson v. City of Bessemer City,* 470 U.S. 564 (1985).

In their briefs to the Court of Appeals, neither the NCAA nor the SWC challenged the fact findings of the district court. An appellant has the burden to show that a fact finding is clearly erroneous, and the burden is a heavy one. *Butler v. Hamilton,* 542 F.2d 835 (10th Cir. 1976). Even when fact findings are challenged, reversal is proper only when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Matter of Multiponics, Inc.,* 622 F.2d 709, 723 (5th Cir. 1980). An appellate court may not reverse the fact findings of a district court simply because the appellate court is convinced that it would have decided the case differently. *Anderson v. City of Bessemer City,* 470 U.S. 564 (1985). Yet, as the language of the Court of Appeals' opinion in the case at bar clearly shows, the Court of Appeals reviewed the evidence *de novo* and rejected fact findings merely because it disagreed with the findings, which is in conflict with both Rule 52(a) and the holding of this Court in *Anderson.*

The district court found that the SWC shares a common objective with its state supported members, that the

goals and objectives of the Gulf Star Conference[2] and the SWC are virtually identical, that the funds paid to the SWC by its members are used for its general operation, and that the funds paid to the SWC are not paid as the result of a typical arms-length transaction. *Kneeland v. NCAA*, 650 F. Supp. 1047, 1062-63 (W.D. Tex. 1986). The Court of Appeals incorrectly used mere disagreement as the basis for its reversal of these fact findings:

> The district court concluded that the SWC constitution and bylaws impose no obligation on the SWC to provide specific and measurable services. In addition, the district court considered the SWC to be virtually analogous to the Gulf Star Conference. *We do not agree.*

Kneeland v. NCAA, 850 F.2d 224, 231 (5th Cir. 1988) (emphasis added). Under Rule 52(a), mere disagreement with the district court's fact findings is not a sufficient ground for reversal and does not make the fact findings clearly erroneous. *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).

The Court of Appeals' reversal of the district court's fact findings concerning the NCAA is similarly flawed. In reversing the district court's finding that television rights revenues paid to the NCAA are not exchanged for specific measurable services, the Court stated that it was "persuaded" that the services were specific and measurable. *Kneeland v. NCAA*, 850 F.2d 224, 230 (5th Cir. 1988). In reversing the district court's finding that pub-

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[2] In TEX. ATT'Y GEN. OP. NO. JM-116 (1983) the Texas Attorney General held that the Gulf Star Athletic Conference was subject to the Act because Texas public colleges paid annual dues to the Conference to support its general purposes.

lic funds paid in connection with championship events are paid for general support and not in return for measurable services, the Court stated that it was "not persuaded," that it did "not perceive this as other than consideration for specific measurable services," and that it is "convinced that the members receive a *quid pro quo* . . . for any public expenditures inherent in hosting a championship event." *Id.*

Whether an appellate court is "persuaded" or "convinced" is immaterial to a review of the district court's findings of fact under Rule 52(a). As this Court stated in *Anderson:*

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it *even though convinced* that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact-finder's choice between them *cannot* be clearly erroneous.

Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985) (emphasis added).

In the case at bar, the Court of Appeals reviewed the evidence *de novo* and assumed the role of a "super fact-finder" to substitute its judgment for that of the district court and to reach the result the Court of Appeals preferred. An appellate court must not yield to the temptation of duplicating the role of the district court, as the Court of Appeals did in this case. *Id.* at 573. The district court's fact findings were amply supported by the evidence, including admissions by the NCAA and the SWC that the public funds were used for their general sup-

port, and the fact findings were not clearly erroneous. Those fact findings represented not only a "permissible view of the evidence," *Anderson v. City of Bessemer City,* 470 U.S. 564, 574 (1985), but the correct view. The Court of Appeals ignored the requirements of Rule 52(a) to reach the result it wanted and, indeed, never stated that the findings it was rejecting were clearly erroneous.

The Court of Appeals Failed to Apply Texas Law

In addition to violating Rule 52(a), the Court of Appeals refused to adhere to 28 U.S.C. § 1652, which provides as follows:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 1652. Certainly this statute requires a district court to apply controlling substantive state law to pendent state claims. *E.g., Bi-Rite Enterprises, Inc. v. Bruce Miner Co., Inc.,* 757 F.2d 440 (1st Cir. 1985), *citing United Mine Workers v. Gibbs,* 383 U.S. 715 (1966). The district court in the case at bar complied with this statute by applying controlling Texas law to Petitioners' pendent state law claim that the NCAA and the SWC were supported in part by Texas public funds and thus were subject to the Texas Open Records Act. The Court of Appeals, in an obvious effort to reach a result, refused to apply controlling Texas authority that athletic associations which receive state funds for their general support are "supported by public funds" and thus subject to the Act. The Court of Appeals also refused to follow state law by

relying on a Texas Attorney General's decision that had been expressly overruled.

Under Texas law, the Texas Attorney General has been vested with unique authority in construing the Texas Open Records Act. As the Court of Appeals acknowledged:

> The usual deference paid to formal opinions of state attorneys general is accentuated in this case because the Texas Legislature has formally invited its Attorney General to interpret the Act when asked to do so. . . . Finding no dispositive Texas jurisprudence on this issue, we closely examine the opinions of the Texas Attorney General.

Kneeland v. NCAA, 850 F.2d 224, 228 (5th Cir. 1988).

What the Court of Appeals failed to recognize is that the Attorney General's opinions, in the absence of contrary court decisions, constitute "dispositive Texas jurisprudence" on the issues in this case because the state legislature has expressly delegated to the Attorney General the duty to interpret the Act and has authorized a suit for mandamus if the Attorney General's interpretation of the Act is not followed. TEX. REV. CIV. STAT. ANN. art. 6252-17a, §§ 7-8. In JM-116, the Texas Attorney General held the Gulf Star Athletic Conference, a voluntary association of three Texas schools and three Louisiana schools, to be subject to the Act by virtue of the Texas state schools' payment of a $20,000 initiation fee and $10,000.00 in annual dues. TEX. ATT'Y GEN. OP. No. JM-116 (1983).

The Attorney General held in JM-116 that the money paid to the conference would be used for general support

rather than for "specific payment for specific measurable services." *Id.* In so holding, the Attorney General thus applied the established factual test to determine, for purposes of the Act, when a private organization is supported, at least in part, by public funds. According to the Attorney General, if a private organization renders specific *measurable* services to the state or a political subdivision in return for a *certain* amount of money, the relationship is one of vendor-vendee and the Act does not apply. TEX. ATT'Y GEN. ORD. Nos. 302 (1982); 228 (1979) (private, non-profit corporations). If, however, *any* part of the public funds paid to a private organization is not paid in exchange for specific measurable services, or is to be used for the general purposes of the private organization, then the payment constitutes "support in part" by public funds, and the private organization is subject to the Act.[3] TEX. ATT'Y GEN. ORD No. 302 (1982).

In reversing the district court's fact findings that Respondents are supported in part by public funds, the Court of Appeals failed to distinguish the Attorney General's opinion in JM-116, although it attempted to do so:

> We view the SWC as markedly different from the Gulf Star Conference which, *in its organic instrument*,

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[3] The uncontroverted evidence established that the NCAA and the SWC provide services, but not in exchange for certain amounts of money. Some member schools of the SWC pay *no* money to the Conference, but they receive the same services as those public schools which provide millions of dollars per year to the Conference. Some member schools of the NCAA pay only dues, while in 1984-85, two Texas public universities paid, in addition to dues, over $63,000 in television rights fees. Yet under NCAA rules, the services provided to any specific school does not depend on whether that school ever pays any football television fees to the NCAA.

> spoke of its common identity and purpose with its members, but identified no service designed to implement its purpose. That is not the case with the SWC.

Kneeland v. NCAA, 850 F.2d 224, 231 (5th Cir. 1988) (emphasis added). No Gulf Star Conference document was in evidence in this case, and JM-116 quotes only *one* of the Gulf Star Conference's general purposes, which is virtually identical to Article II of the SWC Constitution. Moreover, the Gulf Star Conference's "organic instrument" was offered into evidence by Petitioners but excluded on objection by Respondents, and the Court of Appeals' construction of that instrument is contrary to the offer of proof made by Petitioners.

SWC Commissioner Jacoby testified that the proproviding of services by the SWC and the Gulf Star Conference *is not* one of the primary differences between the two conferences. The record also included an offer of proof showing that *both* conferences provide services and that the services provided are similar. Thus, the Court of Appeals' attempt to distinguish JM-116 has no support in and conflicts with the record, and its failure to follow controlling state law as expressed by JM-116 violated 28 U.S.C. § 1652.

The Court of Appeals also refused to follow controlling state law by relying on the Attorney General's opinion in TEX. ATT'Y GEN. ORD No. 343 (1982), which had been expressly overruled, in reversing the district court's fact findings. The Court of Appeals described this opinion as follows:

> [T]he Attorney General found specific measurable services prescribed in an agreement between Amarillo

> Medical Service (AMS) and Amarillo Hospital District. Under the contract, AMS was to provide emergency medical services. . . . The Attorney General concluded that AMS was to perform specific duties for which it was to receive "each month a sum equal to the difference between cash receipts and approved operating expenditures of the ambulance service. . . ." *This language was viewed as imposing an obligation to make specific payment for specific services.*

Kneeland v. NCAA, 850 F.2d 224, 229 (5th Cir. 1988) (emphasis added). The Court of Appeals applied this interpretation of ORD-343 to the facts and concluded that the exchange of services provided by the NCAA and the SWC for public funds are so factually similar to the AMS situation as to require the same result as in ORD-343. According to the Court of Appeals, "[w]e view this as sufficiently similar to the emergency medical services which passed muster in ORD-343." *Id.* at 230.

The emergency medical service, however, did *not* "pass muster," because the Attorney General overruled that portion of ORD-343 in JM-821. TEX. ATT'Y GEN. OP. No. JM-821 (1987). In that opinion, the Attorney General concluded that the emergency medical service examined in ORD-343 was *not* providing specific measurable services in exchange for a certain amount of money and thus the Attorney General's earlier decision in ORD-343 could not be relied upon:

> [T]he determination in Open Records Decision No. 343 with regard to a "governmental body" under the act should not be relied upon.[2]

[2] Review of the contract at issue in Open Records Decision No. 343 reveals that the contract did not involve "a specific and definite obligation on the [en-

> tity] to provide a *measurable* amount of service in exchange for a *certain* amount of money as would be expected in typical arms-length contract for services between a vendor and purchaser."

TEX. ATT'Y GEN. OP. No. JM-821 at 4 (1987) (emphasis added). The Court of Appeals' statement that it "relied upon" the governmental body determination in ORD-343 to support its reversal of the district court's fact findings, despite the Attorney General's explicit statement not to do so, demonstrates the Court of Appeals' refusal to comply with 28 U.S.C. § 1652 and refusal to defer to the opinions of the Texas authority expressly charged by law with the duty to interpret the Act.[4]

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[4] The Court of Appeals' attempt to distinguish JM-821 reveals the result-oriented bent of its decision. The Court of Appeals inexplicably asserted that it did not "comprehend" JM-821 as "preclud[ing] any future reliance on" ORD-343, in spite of the Attorney General's pronouncement that "the determination in [ORD-343] with regard to a 'governmental body' under the act *should not be relied upon.*" JM-821 at 4 (emphasis added). The Court of Appeals also acknowledged but disregarded the Attorney General's partial reliance in JM-821 on the district court's opinion in the case at bar. The Attorney General described the district court's opinion as "following Open Records Decision No. 228." *Id.* Moreover, in its *amicus curiae* brief on rehearing, the State of Texas, speaking through its Attorney General, unequivocally informed the Court of Appeals that the Court had failed to follow JM-821 and that ORD-343 had been overruled. Because of the "accentuated deference" accorded Attorney General decisions under the Act, the Attorney General's citation with approval of the district court's determination of the "governmental body" issue requires under Texas law, and thus under 28 U.S.C. § 1652, that the Court of Appeals affirm the decision of the district court on that issue, absent contrary Texas judicial decisions.

CONCLUSION

A writ of certiorari should issue to review the judgment of the Court of Appeals for the Fifth Circuit, which reversed the district court's judgment. The Court of Appeals wholly failed to follow the plain mandate of Rule 52(a) and erroneously undertook the role of a district court to overturn the district court's fact findings. The clearly erroneous rule cannot be ignored by an appellate court, and the Court of Appeals should not have allowed its disagreement with the district court's fact findings to replace the standard of review required by Rule 52. Furthermore, the Court of Appeals should have followed the requirements of 28 U.S.C. § 1652 and applied controlling

state law to Petitioners' pendent claims. Therefore, the petition for writ of certiorari should be granted.

Respectfully submitted,

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A.H. Belo Corp., d/b/a The Dallas Morning News, The Times Herald Printing Co. and David Eden, Intervenors-Appellees, Cross-Appellants,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, and Southwest Athletic Conference, Defendant-Appellants, Cross-Appellees.

No. 86-1825.

United States Court of Appeals,
Fifth Circuit.

July 26, 1988.

Rehearing and Rehearing En Banc
Denied Aug. 25, 1988.

Various broadcasters and newspapers brought § 1983 action against National Collegiate Athletic Association and Southwest Athletic Conference, to compel disclosure of information relating to alleged misconduct by member institutions. The United States District Court for the Western District of Texas, James R. Nowlin, J., 650 F.Supp. 1047, 1064 and 1076, held for plaintiffs, and appeal was taken. The Court of Appeals, Politz, Circuit Judge, held that National Collegiate Athletic Association and Southwest Athletic Conference were not governmental bodies, and thus were not subject to Texas Open Records Act.

Reversed.

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Appeals from the United States District Court for the Western District of Texas.

Before THORNBERRY, POLITZ and WILLIAMS, Circuit Judges.

POLITZ, Circuit Judge:

The essential question posited on this appeal is whether the National Collegiate Athletic Association (NCAA) and the Southwest Athletic Conference (SWC) are subject to the Texas Open Records Act, Tex.Rev.Civ.Stat.Ann. art. 6252-17a (Vernon Supp.1988). The district court found that the NCAA and SWC received public funds and were governmental bodies within the meaning of the Act. It further found no validity to constitutional claims, asserted statutory exemptions, and a claimed tort-law bar to appli-

cation of the Act.[1] We agree with the district court that the funds involved are public funds, but disagree that the NCAA and SWC are governmental bodies. So concluding, we reverse.

BACKGROUND

The facts are set forth fully in the district court opinions reported in 650 F.Supp. at pages 1047, 1064 and 1076. Some are discussed in detail herein. We begin by noting that the genesis of this litigation was a football recruiting scandal at Southern Methodist University, Dallas, Texas. Kneeland, a reporter for the Dallas Morning News, A.H. Belo Corporation, d/b/a The Dallas Morning News, The Times Herald, and David Eden, invoked the Act and sought disclosure of the data developed in the investigations by the NCAA and SWC. When their requests were denied, complainants petitioned the Texas state court for a mandamus commanding disclosure. After removal to federal court because of the § 1983 claims, and a bifurcated trial, the district court held that the NCAA and the SWC were governmental bodies subject to the Act. The district court based its resolution on findings and conclusions about the organization and funding of the NCAA and SWC which we briefly examine.

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1. The trial court handled the matter in three stages, and its decision is so reported. *Kneeland v. NCAA*, 650 F.Supp. 1047 (W.D.Tex.1986) (dismissing the 42 U.S.C. § 1983 claims and holding that the NCAA and SWC received public funds and were governmental bodies subject to the Act, and that the information sought was public information); *Kneeland v. NCAA*, 650 F.Supp. 1064 (W.D.Tex.1986) (denying all defenses except possible statutory exemptions); and *Kneeland v. NCAA*, 650 F.Supp. 1076 (W.D.Tex.1986) (ruling on exemptions and granting relief to complainants).

NCAA

The NCAA is a private association composed of public and private colleges and universities from across the United States. There are member institutions in every state, including four public universities in Texas. The SWC and other regional associations are also members. The NCAA is governed by a constitution, a set of bylaws, and extensive regulations, to which all members commit. The member institutions send delegates to national conventions. These delegates elect a council which, in turn, elects an executive committee which transacts the business of the association, including the collection of dues. In addition, the delegates elect multiple committees which are assigned either responsibilities for a particular sport or an overall function.

The NCAA derives its income from three sources: dues, assessments on television gross rights fees, and championship games and tournaments.

The NCAA receives a four percent assessment on the gross rights fees paid to members for nationally telecast conference football games. Revenue generated by this assessment is used to fund the NCAA's post-graduate scholarship programs and football related services.

The largest part of NCAA revenues comes from championship events.[2] The hosting members receive specifically listed expenses, and a percentage, 10 to 15 percent, of the gross receipts from the events, including concessions. The

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2. In 1985-86, the NCAA budget was $49,367,000. Championship events accounted for 84.8%—$41,863,210.

net is remitted to the NCAA. A portion thereof is used to defray the travel and per diem expenses of the visiting teams.

SWC

The SWC is a non-profit association composed of nine member-universities, including four Texas public institutions. It is governed by a constitution and bylaws. Its revenues are generated by gate receipts and television fee assessments. Under the SWC bylaws, each member remits 15% of its share of the receipts from non-conference regionally or nationally televised games. Teams in conference games share 30%; the remainder is remitted to the SWC. Payments previously were directed to the universities. Since initiation of this litigation the SWC has requested that the television networks send the payments directly to the SWC, which deducts its percentage and forwards the remainder to its members. Each year the SWC sets aside its estimated expenses for the coming year and it then makes an equal distribution of the excess funds to its nine member-universities.

ANALYSIS

A. *Public Funds*

The Act defines public funds as "funds of the State of Texas or any governmental subdivision thereof." Tex. Rev.Civ.Stat.Ann. art. 6252-17a, § 2(1)(F); (Vernon Supp. 1988). Texas universities and colleges are created by the Texas Constitution and are subdivisions of the state. Our inquiry is whether the revenues remitted to the NCAA and the SWC by Texas public universities are public funds under the Act.

1. *NCAA*

The district court held that the sums paid by public schools to the NCAA in dues, assessments of television gross rights fees, and unreimbursed salaries and costs connected with championship events, were public funds. The court found that the atheletic departments of Texas state universities were auxiliary enterprises, and funds in their accounts were public funds belonging to the State of Texas. The court also held that under the holding of *Board of Regents of University of Oklahoma v. NCAA,* 546 F.Supp. 1276 (W.D.Okla.1982), *aff'd.,* 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed. 2d 70 (1984), football television rights are owned by universities, those belonging to public schools belong to the state and the revenues derived become state funds. The NCAA does not challenge either ruling. Rather, it contends that it is the exclusive owner of the championship events, and that the ultimate issue is whether its Enforcement Division, which developed and holds the investigative records at issue herein, is the recipient of public funds, assuming that there were unreimbursed costs and expenses, since the championship events are structured with a percentage component arrangement.

The evidence relative to the sources of the $1.5 million budget of the Enforcement Division is conflicting. The district court found that revenues from telecast assessments, as well as that derived from championship events, were used to fund all NCAA divisions, including enforcement. Considering the earmarking of assessments for "football related services," and the testimony by the NCAA comptroller that all funds were commingled, the tracing of specific funds to specific functions is not pos-

sible. The district court's factual finding that Enforcement Division funds came from all three revenue sources easily withstands a clearly erroneous challenge. Fed.R. Civ.P. 52(a). Accordingly, even if the costs of unreimbursed goods and services provided for championship events are not deemed public funds, it is still apparent that the Enforcement Division receives some public funds.

2. *SWC*

The SWC Bylaws are part of the contractual arrangement between member-schools and the SWC. Bylaw 9.04 (A) requires members to tender one-half of their receipts from non-conference football games, while Bylaw 9.05 entitles the SWC to 70% of the receipts of conference games. In addition, the SWC receives television gross rights fees assessments. As noted, after deducting anticipated expenses the SWC annually returns these funds in equal portions to its nine members.

SWC maintains that the monies received from gate receipts and television broadcasts belong to it, that its members merely act as collecting and disbursing agents. The district court rejected this argument. The SWC now reurges it, citing *A.H. Belo v. Southern Methodist University,* 734 S.W.2d 720 (Tex.App.1987—error denied May 18, 1988). In that case the Texas intermediate appellate court held that the funds annually distributed to the four private-member universities (Southern Methodist University, Texas Christian University, Baylor and Rice) were not public funds, and that by receipt thereof, the four universities did not become governmental bodies.

SWC and NCAA would have us read this decision as authority for the proposition that television broadcast rev-

enues and fee assessments paid by the Texas public institutions to the SWC are private funds held in trust by the members for the SWC. The same argument would apply to the four percent gross rights fee assessment imposed by the NCAA Bylaw 8-2-(c). The argument is based on the fact that gate receipts and broadcast fees received by athletic departments are considered auxiliary or local funds which need not be deposited in the state treasury. Tex.Ed.Code Ann. § 51.002. However, guiding jurisprudence and persuasive opinions[3] of the Texas Attorney General, issued over an extended period of time, convince us that these funds are public funds.

Property of various kinds comprise public funds. *Goggans v. Simmons,* 319 S.W.2d 442 (Tex.Civ.App.1958) (*writ ref'd n.r.e.*). Property includes obligations, rights, and other intangibles. *Womack v. Womack,* 141 Tex. 299, 172 S.W.2d 307 (1943). The right inherent in permitting the telecast of a football game is a property right belonging to the universities. *Board of Regents of University of Oklahoma v. NCAA, supra.* All funds belonging to the University of Texas are state funds. *Walsh v. University of Texas,* 169 S.W.2d 993 (Tex.Civ.App.1942) (*writ ref'd*). And as opined by the Texas Attorney General in the footnoted opinions, an obligation to pay money to a state university and an assignment of a right to collect money owed to a state university both constitute public funds. Further, all revenues received by state colleges and universities, except for trust funds, are state funds. Finally, the

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3. See for example, Tex. Att'y Gen. No. JM-710 (1987); JM-575 (1986); ORD-268 (1981); MW-25 (1979); H-456 (1974); and O-1662 (1940).

receipt of income may not be shortstopped and its character changed by an anticipatory assignment. *Lucas v. Earl,* 281 U.S. 111, 50 S.Ct. 241, 74 L.Ed. 731 (1930). Nor may such an assignment create a trust. *McCord v. Fort Worth National Bank,* 275 S.W.2d 717 (Tex.Civ.App.1955) (*writ ref'd n.r.e.*).

We agree with the district court that the gate receipts and television revenue paid to the NCAA and SWC are public funds.

B. *Governmental Bodies*

Section 2(1)(F) of the Act, Tex.Rev.Civ.Stat.Ann. art. 6252-17a, § 2(1)(F), contains the pertinent language defining a governmental body as including

> the part, section or portion of every organization, corporation, commission, committee, institution, or agency which is supported in whole or in part *by public funds.* . . . (emphasis added).

Since we have determined that the monies involved are public funds, we must now resolve whether those funds constitute the "support" envisioned by the Act. It is in the resolution of this inquiry that we disagree with the trial court.

The usual deference paid to formal opinions of state attorneys general is accentuated in this case because the Texas Legislature has formally invited its Attorney General to interpret the Act when asked to do so. Tex.Rev. Civ.Stat.Ann. art. 6252-17a, § 7. The Texas Attorney General has concluded that the Act does not apply to "private persons or businesses simply because they provide specific goods or services under a contract with a government

body." Tex. Att'y Gen. No. ORD-1 (1973) (a bank holding funds of a governmental body is not subject to the Act).

Finding no dispositive Texas jurisprudence on this issue, we closely examine the opinions of the Texas Attorney General. We find helpful signs, albeit mixed signals, in the opinions, which generally are fact-specific. We perceive three distinct patterns of analysis in opinions interpreting this aspect of the Act.

The opinions advise that an entity receiving public funds becomes a governmental body under the Act, unless its relationship with the government imposes "a specific and definite obligation . . . to provide a measurable amount of service in exchange for a certain amount of money as would be expected in a typical arms-length contract for services between a vendor and purchaser." Tex. Att'y Gen. No. JM-821 (1987), *quoting* ORD-228 (1979). That same opinion informs that "a contract or relationship that involves public funds and that indicates a common purpose or objective or that creates an agency-type relationship between a private entity and a public entity will bring the private entity within the . . . definition of a 'governmental body.' " Finally, that opinion, citing others, advises that some entities, such as volunteer fire departments, will be considered governmental bodies if they provide "services traditionally provided by governmental bodies."

When we attempt to apply these patterns of analysis to the facts at bar it is apparent that a tension is created. One may have no quarrel with the formulae, but the direction given is a mite uncertain. On the one hand, as we discuss in more detail, *infra*, the NCAA and SWC provide

services to Texas public universities, but obviously not as specific or finitely measurable as done by a company which sells pencils or repaints buildings. On the other hand, there apparently is some common purpose or objective between the association and the universities, or they would not be drawn to each other, but there is no real identity of interest and neither may be considered the agent of the other. Only one of the patterns of analysis occasions no tension—neither the NCAA nor the SWC performs what may be considered traditional governmental functions.

A parsing of a few attorney general opinions illumines our way. In Tex. Att'y Gen. No. ORD-228 (1979) the Attorney General addressed a private, non-profit commission chartered to promote the interests of the Dallas-Fort Worth metropolitan area. Fort Worth paid the Commission $80,000 for three years. The contract obliged the Commission to "implement such new and innovative programs as will further its corporate objectives and common City's interests and activities." The Attorney General construed this charter as providing public funds for the general support of the Commission's activities, and subjected the Commission to the Act as a governmental body.

Similarly, a foundation formed to "render aid to [local] manufacturing and industrial enterprises," and to induce others to settle in the locale was deemed the recipient of an unrestricted grant. Tex. Att'y Gen. No. ORD-302 (1982). *See also,* Tex. Att'y Gen. No. MW-373 (1981).

Further, the Attorney General considered the proposed Gulf Star Conference to be a governmental body. Its constitution declared that one of its two stated purposes was to aid members to "incorporate intercollegiate ath-

letics within their respective educational programs and [to] place and maintain such athletics under the same administrative and academic control as that which obtains in their other educational programs." No specific services were proposed. The Attorney General was of the view that funds provided for this purpose would constitute "general support . . . rather than [be] attributable to specific payment for specific measurable services." Tex. Att'y Gen. No. JM-116 (1983).

On the other hand, the Attorney General found specific, measurable services prescribed in an agreement between Amarillo Medical Services (AMS) and Amarillo Hospital District. Under the contract, AMS was to provide emergency medical services, including ambulance service, to persons using the district's medical facilities. The Attorney General concluded that AMS was to perform specific duties for which it was to receive "each month a sum equal to the difference between cash receipts and approved operating expenditures of the ambulance service." Tex. Att'y Gen. No. ORD-343 (1982). This language was viewed as imposing an obligation to make specific payment for specific services.

Application to the NCAA

The trial court, as noted, found three sources of monies paid to or for the benefit of the NCAA: dues, television fee assessments, and unreimbursed services and costs incurred by state universities in championship events. NCAA Bylaw 9-3-(a) provides for dues[4] to cover the direct

4. In 1984-85 dues ranged from $350 for conference members like the SWC, to $1400 for Division I schools.

costs of association publications, convention operations, establishment and maintenance of playing rules and compilation of statistics. The four percent gross rights fees assessments are prescribed by Bylaw 8-2-(c) to "fund the costs of the NCAA post-graduate scholarship program and football-related services of the NCAA." Executive Regulation 1, § 8 covers championship events. The district court found the language of Bylaws 8 and 9 to be "vague and amorphous." We are not inclined to share that characterization.

The NCAA operates through an extensive set of committees, the members of which are elected by the delegates at the annual convention. Electing committee members and formulating policy constitutes the primary business of the annual convention. The NCAA committee members receive travel expenses and a per diem allowance. Hence, public funds paid in dues are used to cover the expenses of the various committees.

The NCAA provides publications to and for the use and benefit of its members. For example, the NCAA guide for the college-bound student athlete is provided to members and a large number are sent to high schools across the country. The association also prepares and distributes television messages, such as those supporting higher education and opposing substance abuse and gambling.

The association provides a national statistics service, ranking teams and individual players, in football, baseball, basketball and softball. Members submit statistics which an appropriate committee verifies, analyzes, and distributes.

There are 16 committees dedicated to the formulation and constant refinement of the playing rules in the various sports, including rules for tournament and championship meets.

In each of these instances—conventions, publications, statistics, rules—member institutions receive specific services and benefits for funds paid. We are satisfied beyond peradventure that dues may not be considered unrestricted grants for the general support of the NCAA.

The same may be said for the television fees assessments. These support a scholarship program for college athletes. The record reflects just under one hundred $2,000 scholarships each year. Recipients are chosen by an NCAA committee from athletes nominated by member institutions.

Football-related services involve the collation and distribution of weekly football statistics, including best team offense, best team defense, best passers, best runners, etc. The association conducts an annual football preview week, bringing coaches to its Kansas City headquarters to meet with representatives of the national media. It produces television spots and films promoting college football. It underwrites startup costs to encourage television and cable owners to become involved in filming athletic contests.

We are persuaded that these services provide sufficient metage for evaluating the exchange between the NCAA and its members. The dues and television fees assessments, which total less than one-sixth of the NCAA's total revenues, are not funds for the general support of

the NCAA, but, rather, are an exchange for known, specific, and measurable services.

That leads, finally, to the claim that the various unreimbursed costs and services incurred by hosting members in championship events constituted general support of the NCAA with public funds. We are not persuaded. Assuming, *per arguendo,* that the incurring of these expenses constitutes the expenditure of public funds, we do not perceive this as other than consideration for specific, measurable services.

The association maintains an elaborate mechanism for formulating rules and procedures for the realization and enforcement of the policies and standards regarding student athletes adopted by the committees and the general assembly. These include, *inter alia,* academic requirements, recruiting safeguards, medical standards, student and team eligibility, and infractions. The Enforcement Division, staffed by 12 full-time and 25 part-time investigators, is involved in the enforcement program. The enforcement staff conducts interviews, collects documents and other data, and generally assists the members of the Committee on Infractions in their official investigations. The Division is charged with investigating any legitimate complaint that a member has failed to maintain academic or athletic standards, or has violated the association's constitution, bylaws, or regulations.

We are convinced that the members receive a *quid pro quo,* in sufficiently identifiable and measurable quantities of services, for any public fund expenditures inherent in hosting a championship event. Members individually and collectively have the benefit of the association's

investigatory service and capability. We view this as sufficiently similar to the emergency medical services which passed muster in ORD-343.

In post-argument memos it is suggested that the recent Tex. Att'y Gen. No. ORD-821 (1987) establishes a new test and precludes any future reliance on Tex. Att'y Gen. No. ORD-343 (1982). We do not so comprehend the recent opinion, but read it, rather, as indicating that the manner of payment to the private entity is not to be the sole determinant. Public status is to turn on a consideration of that factor, along with consideration of the nature and other terms of the transaction. In revisiting ORD-343 in ORD-821, the Attorney General reweighed the underlying facts, went behind the transaction, and noted that the ambulance service could not make expenditures or personnel decisions without approval of the public body. It was because of this reappraisal of the facts that ORD-343 was called into question, not because of its exposition of the law, which is found in several other opinions of the Attorney General.

Finally, we cannot but observe that ORD-821 in part relies upon the case we are now reviewing.

Application to the SWC

The SWC receives no dues; its income derives from television fee assessments and gate receipts from members. Its functions, in many instances, mirror and are a smaller version of the activities of the NCAA. The district court concluded that the SWC constitution and bylaws impose no obligation on the SWC to provide specific and measurable services. In addition, the district court considered

the SWC to be virtually analogous to the Gulf Star Conference. We do not agree.

We view the SWC as markedly different from the Gulf Star Conference which, in its organic instrument, spoke of its common identity and purpose with its members, but identified no service designed to implement its purpose. That is not the case with the SWC. It provides a variety of services, which it trumpets that it will make available to members, including the promoting and administering of competitive awards, the training and scheduling of game officials, and the maintenance of relations with the news media.

We need not belabor the point. The SWC provides specific and gaugeable services which negate the general support element required for a governmental body designation.

Having concluded that the NCAA and SWC are not governmental bodies within the intendment of the Texas Open Records Act, we need not address the other issues raised on appeal.

The judgment of the district court is REVERSED.

Carole KNEELAND, Belo Broadcasting Corporation, the Times Herald Printing Company, David Eden and A. H. Belo Corporation d/b/a Belo Corporation News

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION and Southwest Athletic Conference.

Civ. No. A-85-CA-616.

United States District Court,
W.D. Texas,
Austin Division
May 16, 1986.

Various broadcasters and newspapers requested that they be allowed to inspect and copy certain information relating to infractions or possible infractions of National Collegiate Athletic Association regulations by various Southwest Athletic Conference members. When defendants refused to provide access to information, plaintiffs brought claims pursuant to 42 U.S.C.A. § 1983 and claimed that information sought was subject to Texas Open Records Act. The District Court, Nowlin, J., held that: (1) plaintiff failed to establish that defendants acted under color of state law when they denied plaintiffs' request for information, for purpose of civil rights action; (2) Texas Open Records Act has extraterritorial application; (3) National Collegiate Athletic Association as governmental body subject to Texas Open Records Act; and (4) Act applied to Southwest Athletic Conference.

Order accordingly.

See also 650 F.Supp. 1064, 650 F.Supp. 1076.

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William D. Sims, Paul C. Watler, Jenkens & Gilchrist, Dallas, Tex., for plaintiff-intervenor A.H. Belo Corp. d/b/a The Dallas Morning News.

Frank C. Vecella, Charles L. Babcock, Michael Knapek, Jackson, Walker, Winstead, Cantwell & Miller, Dallas, Tex., for plaintiffs-intervenors The Times Herald Printing Co. and David Eden.

Robert M. Roller, Graves, Dougherty, Hearon & Moody, Austin, Tex., for defendant Nat. Collegiate Athletic Ass'n.

John R. Henderson, Jones, Day, Reavis & Pogue, Dallas, Tex., for defendant Southwest Athletic Conference.

MEMORANDUM OPINION AND ORDER

NOWLIN, District Judge.

This cause came before the Court for a non-jury trial on March 6 and 7, 1986. Pursuant to the Court's order bifurcating the trial of this cause, the issues before the Court are the Plaintiffs claims brought pursuant to 42 U.S.C. section 1983, and whether the Texas Open Records Act, TEX.REV.CIV.STAT.ANN. art. 6252-17a (Vernon Supp.1986) (the "Act"), applies to the National Collegiate Athletic Association (NCAA) and the Southwest Athletic Conference (SWC). The Court has considered the pleadings as well as the evidence adduced at trial and is of the opinion that judgment for the Defendants should be en-

tered on Plaintiffs' claims brought under section 1983, and that both the NCAA and the SWC are subject to the Act.

I. BACKGROUND

The Plaintiffs in this action all sent to the NCAA and SWC requests to inspect and copy certain information relating to infractions or possible infractions of NCAA regulations by various SWC members. Both Defendants alleged they were not "governmental bodies" as defined by the Act and refused to provide access to the information sought by Plaintiffs. Neither Defendant requested that the Texas Attorney General issue an opinion as to whether or not they were subject to the Act though the Act specifically provides for such opinions. *Id.* at § 7. On October 3, 1985, Plaintiffs Kneeland and Belo Broadcasting filed an original petition and application for writ of mandamus in the 261st Judicial District Court of Travis County, Texas. The petition alleges that the Defendants are "governmental bodies" as defined by the Act, and seeks a declaration that the information sought is "public information" under the Act. The petition further seeks a writ of mandamus which directs the Defendants to make available the information sought by the Plaintiffs. Within two weeks of the date that the original petition was filed, A.H. Belo Corporation, d/b/a The Dallas Morning News, and The Times Herald Printing Company and David Eden intervened with similar petitions. On October 26, 1985, the cause was removed to this Court by both Defendants. After a pre-trial conference held on February 6, 1986, the Court granted defendant NCAA's Motion for Separate Trial on the issue of whether the Defendants were "gov-

ernmental bodies" as defined by the Act, and the Plaintiffs' claims brought under 42 U.S.C. section 1983.

II. THE NCAA

The NCAA is a private association consisting of approximately 900 members located in all fifty states. Approximately one-half of the members are public universities or colleges. The NCAA is a Kansas association whose officers and employees are located in Mission, Kansas. Members of the NCAA are placed in various divisions based upon a variety of factors. Most of the major football playing universities, over one-half of which are public universities, are members of Division 1-A. All members of the SWC are members of Division 1-A, and eighteen (18) public universities of the State of Texas are members of other divisions of the NCAA. The SWC is also a member of the NCAA.

The NCAA and its member schools are governed by a constitution, bylaws and executive regulations, that are contained in the 1985-86 NCAA Manual. Members must agree to "administer their athletic programs in accordance with the constitution, the bylaws and other legislation of the Association." NCAA Constitution, art. 4, § 2(a). Further, "telecasting, cablecasting or otherwise televising of intercollegiate football games of member institutions may be subject to the provisions of bylaws enacted by the Association." *Id.* art. 3, § 11.

The NCAA holds an annual convention of all members, and meets at other times as prescribed by the Executive Committee. *Id.* art. 5, § 7(a). Between conventions the establishment and direction of the NCAA's general policy

is entrusted to a Council of the members, elected at the annual convention. The Council elects nine members of the fourteen member Executive Committee. *Id.* art. 5, § 2(c). The Committee has the following duties:

> (1) Transact the business and administer the affairs of the Association in accordance with the policies of the Association and the Council;
>
> * * *
>
> (2) Require all income from membership dues, from activities of the Association and from other sources, except as may be provided in the constitution, bylaws or executive regulations, to be deposited in the general fund;
>
> * * *
>
> (3) Adopt regulations providing for the expenditure of Association funds, conduct of Association meets and tournaments, and distribution of the income of the association. . . .

Id. Neither faculty representative who serve on committees nor voting delegates to the convention receive compensation, other than travel reimbursement, from the NCAA for their NCAA duties.

The president of the NCAA is John R. Davis, Director of Special Programs and Agriculture at Oregon State University; his term expires in January 1987. The Secretary-Treasurer of the NCAA is Wilford S. Bailey, Professor at Auburn University; his term expires in January 1987. The NCAA Division One Vice President is Arliss Roaden from the Tennessee Technological University; his term expires in January 1987. The NCAA Division Two Vice President was Abe Sponberg from North Dakota State

University; his term expired in January 1986. The NCAA Division Three Vice President was Elizabeth Kruczek of Fitchburg State College; her term expired in January 1986. Richard W. Burns, Professor of Teacher Education at the College of Education at the University of Texas at El Paso, was a member of the NCAA Council for a four year period ending in January, 1986. Currently, Albert M. Witte, Professor of Law at the University of Arkansas Law School, is the SWC representative on the NCAA Council.

Until his resignation in January 1986, one year prior to the expiration of his term, Fred Jacoby, SWC Commissioner, served on the NCAA Executive Committee. The 1984-85 Annual Reports of the NCAA contain the Secretary-Treasurer's Report which includes the financial statements of the NCAA for its fiscal years ending August 31, 1984 and August 31, 1985. The report indicates that the NCAA has three principle sources of revenue; dues, television gross rights fees, and championship events and tournaments.

The Bylaws of the NCAA require the payment of annual dues by each member, and the amount of the required annual dues varies depending upon the particular class of membership. The NCAA received dues payments from at least eighteen Texas state universities from the years 1981-82 through 1985-86. During this period, these eighteen Texas state universities paid approximately $77,000 in dues to the NCAA for the years 1981-82 through 1985-86. Each member of the SWC pays NCAA annual dues of $1,800.00 and the SWC pays annual dues of $900.00. These dues are paid by the universities from their auxiliary en-

terprise accounts. Failure to pay dues results in termination of membership and ineligibility of the delinquent member to compete in meets or tournaments of the NCAA. Income to the NCAA from dues payments are deposited into the same bank account as all other NCAA revenues; the NCAA pays all of its expenses from this same general account. Pursuant to NCAA Bylaw 9-3-(a), the revenue derived from annual dues shall be used "to cover the direct costs of Association publications, convention operations, establishment and maintenance of playing rules, and compilation of playing statistics." NCAA Bylaws art. 9, § 3(a).

The Bylaws of the NCAA provide that the gross rights fee paid for each game of a national telecast or cablecast of member institutions' intercollegiate football games shall be subject to an assessment of four per cent to be paid by the home institution to the NCAA to fund the costs of the NCAA postgraduate scholarship program and football-related services of the NCAA. *Id.* art. 8, § 2(c). In the 1984-85 fiscal year, the NCAA received football television gross rights fees assessments from the University of Texas at Austin and Texas A & M University in the total amount of $63,960.00. Income to the NCAA from football television gross rights fees assessments are deposited into the same bank account as all other NCAA revenues. The NCAA pays all of its expenses from this same general account.

The third principle source of revenue to the NCAA is the receipts from championship meets. Regulation 1 of the Executive Regulations of the NCAA governs NCAA championship meets and tournaments. Member institutions which host NCAA championships are responsible

for administering the finances of the tournament in accordance with Regulation 1.

The regulation authorizes the host institution to deduct the greater of 10 to 15 percent of the net receipts or $200 to $750, depending upon the particular tournament, in return for hosting the event. A host institution, however, is not entitled to reimbursement for the cost of permanent equipment, local transportation for competing teams and on-campus facility rental charges. Further, the host institution is not entitled to reimbursement for the time and services rendered by athletic department staff members, including the host institution's athletic director, who administers the tournament. Moreover, costs of the championship event that exceed the NCAA's pre-approved budget are not reimbursed to the host institution.

Texas state univeristies hosted eleven NCAA championship events on their campuses from the years 1981 through 1984. In 1985, The University of Texas sent the NCAA approximately $88,000.00 as net receipts from the University's hosting of the NCAA regional baseball tournament. In 1981 and 1982, the University of Texas sent the NCAA $36,524.83 and $40,707.32, respectively, as payment of net receipts from hosting NCAA championships. In 1984, the University of Houston paid the NCAA $151,876.31 as payment of net receipts from hosting NCAA championships.

The NCAA deposits the revenues it receives from Texas public universities, together with the revenues it receives from its other members, into a single general bank account from which the NCAA pays all of its expenses. Revenues received by the NCAA from member institutions

which host NCAA championship events are used to fund all departments of the NCAA, including the enforcement department.

III. THE SWC

The Defendant SWC is an unincorporated non-profit association of nine member universities, four of which are Texas public universities. The Texas public university members are the University of Texas at Austin, Texas Tech university, the University of Houston and Texas A & M University. The other members of the SWC are Baylor University, Southern Methodist University and Texas Christian University, which are private, church-sponsored institutions; William Marsh Rice University, a private institution; and, the University of Arkansas, a public University of the State of Arkansas. The Conference employs a paid staff and incurs general operating expenses for such items as administrative offices, public relations, travel annuities, investigations, donations and miscellaneous matters.

The current president of the Southwest Athletic Conference is Dr. Michael T. Johnson, the faculty representative from the University of Houston. Dr. Johnson on one occasion has had his teaching load reduced by the University of Houston in part to compensate him for his duties as faculty representative to the Southwest Athletic Conference. The University of Houston maintains an executive liability and indemnification policy of insurance covering Dr. Johnson's acts as Southwest Athletic Conference President and faculty representative.

The SWC is governed by a constitution and bylaws, and operates under an annual budget. The 1986 Budget of operating and payroll expenses amounts to approximately $919,100.00. The receipt of revenue by the SWC is governed by Article IX of the Conference Bylaws. The SWC receives revenue from only five (5) sources: (1) post-season football bowl games; (2) football television broadcasts; (3) post-season basketball tournaments; (4) basketball television broadcasts; and, (5) interest-bearing bank accounts. SWC members do not pay dues, assessments or fees, though SWC Bylaws provide that if its revenues from member institutions are insufficient to pay its expenses, the conference can make assessments against its member institutions. SWC Bylaws art. 9. The SWC does not receive any federal or state tax-generated revenues or legislative appropriations. Its two principle sources of revenue are derived from television and post-season bowl game revenues. The vast majority of the revenue derived from telecast football games is paid directly to the SWC by its member schools pursuant to a formula set out in the bylaws. SWC Bylaws art. 9.04. (The Conference receives a much smaller portion of its telecast revenues from a broadcasting agreement with RAYCOM, Inc., which telecasts approximately eight SWC games during the season.)

Article 9.04 of the Conference Bylaws provides that any "SWC team competing in a non-conference regionally or nationally televised football game shall retain fifty (50) percent of that team's share of the receipts and fifty (50) percent of that team's share of the receipts shall be paid to the Conference office." SWC Bylaws art. 9.04. Teams competing in regionally or nationally televised con-

ference games "retain thirty (30) percent (15 percent for each team) of the receipts and seventy (70) percent of the receipts shall be paid to the Conference office." *Id.* All television receipts from the syndicated conference football television package (RAYCOM) are paid to the Conference office. This procedure was followed through November 16, 1985. On that date, two weeks after his deposition was taken in this cause, SWC Commissioner Fred Jacoby wrote a letter to the College Football Association requesting that payments for the telecasts of football games played by SWC members during the 1985 football season be sent directly to the SWC. Since that date, the SWC deducts and retains that percentage of the receipts that the bylaws direct be sent to it, deducts a 4% assessment of the proceeds which is sent to the NCAA, and sends the remaining balance to the SWC school(s) which participated in the televised football game.

The proceeds from national and/or regional telecasts or cablecasts of SWC member schools (other than the RAYCOM telecast) were sent directly to the schools from 1981 through the 1984-85 academic year. Other than RAYCOM contracts, neither the SWC nor the NCAA are parties to any football television contracts under which the SWC schools receive proceeds. The University of Texas at Austin received proceeds of television rights fees by check made payable to the University. Upon receipt the check would be deposited into a University checking account along with other revenues received during a given time period. The athletic department of the University would then submit a local funds voucher to the Bursar's Office where a check would be made payable to either the NCAA, the SWC, or both, in payment of the University's obliga-

tion under the respective bylaws of the NCAA and SWC. The University of Houston followed a similar procedure. The funds received by the Southwest Athletic Conference from the member universities come from the auxiliary enterprises of the member universities. Funds received by the SWC from its member schools are deposited into its interest-bearing checking account at the Bank of Dallas from which bank account the SWC pays all of its expenses. The SWC takes money out of its interest-bearing checking account and invests it in certificates of deposit from time to time.

Under Article IX of the SWC Bylaws, each Spring the Commissioner prepares a budget each Spring of the Conference's operating expenses for the following academic year. Once the budget is approved by the SWC's executive committee, the SWC deducts from its current funds an amount equal to the approved budget, and then distributes the remaining funds equally to its member universities. The funds deducted are used to pay the SWC's operating expenses.

IV. SECTION 1983 CLAIMS

Plaintiffs Kneeland and Belo Broadcasting, as well as Belo Corporation d/b/a The Dallas Morning News,[1] claim that the Defendants' refusal to provide the records and information requested violated their constitutional right of access to public information, and therefore gives rise to a cause of action under 42 U.S.C. section 1983. The

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1. Plaintiffs Dallas Times Herald and David Eden voluntarily dismissed their § 1983 claims by amendment on February 12, 1986.

Defendants argue that the Plaintiffs have no constitutional right to the records they seek, and that they did not act under color of state law when they refused to disclose the information.

The Defendants are only subject to a suit under section 1983 if they acted "under color of state law" when they denied Plaintiffs' request for information. 42 U.S.C. § 1983; *Rendell-Baker v. Kohn*, 457 U.S. 830, 835-36, 102 S.Ct. 2764, 2768-69, 73 L.Ed.2d 418 (1982); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974). The Defendants have acted under color of state law if "there is a sufficiently close nexus between the State and the challenged action of the [Defendants] so that the action of the latter may be fairly treated as the action of the State itself." *Jackson*, 419 U.S. at 531, 95 S.Ct. at 453. Consequently, the Court must determine whether the alleged infringement of Plaintiffs' constitutional rights is "fairly attributable to the State." *Lugar v. Edmindson Oil Co.*, 457 U.S. 922, 937 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482 (1982). No precise formula determines whether otherwise private conduct constitutes state action.[2] *Arlosoroff v. National Collegiate Athletic Association*, 746 F.2d 1019, 1021 (4th Cir. 1984). The Court must determine the facts and circumstances of each case in making this determination. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961).

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2. The "under color of state law" requirement of 42 U.S.C. § 1983 reflects the state action requirement of the 14th Amendment; consequently, the semantic distinction between these phases is of no import. *Rendell-Baker*, 457 U.S. at 838, 102 S.Ct. at 2769 (*citing United States v. Price*, 383 U.S. 787, 794 n. 7, 86 S.Ct. 1152, 1157 n. 7, 16 L.Ed.2d 267 (1966)).

The Fifth Circuit has determined that activities of the NCAA constitute action under color of state law. *Hennessey v. National Collegiate Athletic Association,* 564 F.2d 1136, 1144 (5th Cir.1977) (adopting memorandum opinion of district court); *Parish v. National Collegiate Athletic Association,* 506 F.2d 1028, 1032-33 (5th Cir. 1975); *accord Howard University v. National Collegiate Athletic Association,* 510 F.2d 213 (D.C. Cir. 1975). This Court is of the view, however, that the Supreme Court decisions in *Rendell-Baker v. Kohn,* 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982), and *Blum v. Yaretsky,* 457 U.S. 991, 102 S.Ct. 2777, 75 L.Ed.2d 534 (1982), require a different result.

Under *Rendell-Baker* and *Blum,* state subsidization with public funds and extensive state regulation do not necessarily convert private action into state actions. *Rendell-Baker,* 457 U.S. at 840-41, 102 S.Ct. at 2770-71; *Blum,* 457 U.S. at 1007-10, 102 S.Ct. at 2787-89. Further, the Court noted that a private party's performance of a function which serves the public does not necessarily make its acts state action. "[T]he question is whether the function performed has been 'traditionally the *exclusive* prerogative of the State.'" *Rendell-Baker,* 457 U.S. at 842, 102 S.Ct. at 2772 (citations omitted) (emphasis original).

The Plaintiffs have made no showing that the State of Texas or the state universities which are members of the Defendant associations, acted in any manner which caused the Defendants to deny the Plaintiffs' request for information. Further, this Court's ruling that Defendants are governmental bodies under the Act does not compel a finding that Defendants' action amounted to state action. The Act defines a governmental body as an association

"which is supported in whole or in part by public funds, or which expends public funds." TEX.REV.CIV.STAT. ANN. art 6252-17a, § 2(1)(F) (Vernon Supp.1986). Under *Rendell-Baker* state subsidization with public funds is not sufficient to convert private action into state action, *Rendell-Baker,* 457 U.S. at 840, 102 S.Ct. at 2770; consequently, the Court's determination that Defendants are governmental bodies does not require a finding that their actions are state actions.

Finally, the Plaintiffs have failed to establish that the Defendants perform a public function which is "traditionally exclusively reserved to the state." The Defendants doubtless perform some sort of public function in regulating the nation's intercollegiate athletics; however, the state is not necessarily required to undertake such functions. *See Blum,* 457 U.S. at 1004, 102 S.Ct. at 2785. This conclusion becomes evident in light of the Court's ruling in *Rendell-Baker.* If the public function performed in that case does not amount to one traditionally exclusively reserved to the state, then neither does regulation of intercollegiate athletics. Regulation of intercollegiate athletics is not a function "traditionally *exclusively* reserved to the state." *Jackson,* 419 U.S. at 352, 95 S.Ct. at 454 (emphasis added); *accord Arlosoroff,* 746 F.2d at 1019; *McHale v. National Collegiate Athletic Association,* 620 F.Supp. 67 (N.D.N.Y.1985) (memorandum opinion). Plaintiffs have failed to establish that the Defendants acted under color of state law when they denied Plaintiffs' request for information. Pursuant to *United Mineworkers v. Gibbs,* 383 U.S. 715, 725-29, 86 S.Ct. 1130, 1138-41, 16 L.Ed.2d 218 (1965), the Court in its discretion,

hereby exercises its pendent jurisdiction and retains the Plaintiffs' state law claims.

V. THE TEXAS OPEN RECORDS ACT

The Act was passed by the 63rd Legislature in 1973. It was part of a wave of governmental reform precipitated by the infamous "Sharpstown Scandal." The Act begins with a general declaration of policy:

> Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the State of Texas that all persons are, unless otherwise expressly provided by law at all times entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. To that end, the provisions of this Act shall be liberally construed with the view of carrying out the above declaration of public policy.

TEX.REV.CIV.STAT.ANN. art. 6252-17a, § 1 (Vernon Supp.1986).

The Act provides for public access to information retained by a "governmental body" as defined in section 2(1) of the Act. Section 2(1) defines a "governmental body" as:

> (A) any board, commission, department, committee, institution, agency, or office within the execu-

tive or legislative branch of the state government, or which is created by either the executive or legislative branch of the state government and which is under the direction of one or more elected or appointed members;

(B) the commissioners court of each county and the city council or governing body of each city in the state;

(C) every deliberative body having rulemaking or quasijudicial power and classified as a department agency or political subdivision of a county or city;

(D) the board of trustees of every school district and every county board of school trustees and county board of education;

(E) the governing board of every special district;

(F) the part, section, or portion of every organization, corporation, commission, committee, institution, or agency which is supported in whole or in part by public funds, or which expends public funds. Public funds as used herein shall mean funds of the State of Texas or any governmental subdivision thereof.

(G) the Judiciary is not included within this definition.

Id. at § 2(1). Subdivision F provides the basis for the Plaintiffs' argument that the Defendants are governmental bodies within the meaning of the Act. Thus, the key issue in determining whether the Defendants are governmental bodies is whether they are supported in whole or in part by public funds, or whether they expend public funds. Subdivision F specifically defines public funds as "funds of the State of Texas or any governmental subdivision thereof." *Id.* This broad provision does not limit the definition of public funds to a particular

source, i.e., tax revenues. In fact, under Texas law "public funds" include the State's money, property and contractual rights. *See Rhoads Drilling Co. v. Allred,* 123 Tex. 229, 70 S.W.2d 576, 581-82 (1934); *Goggans v. Simmons,* 319 S.W.2d 442, 445 (Tex.Civ.App.—Fort Worth 1958, writ ref'd n.r.e.); TEX.ATT'Y GEN.OP. NO. MW-25;[3] *see also Womack v. Womack,* 141 Tex. 299, 172 S.W.2d 307, 308 (1943); The time and services provided by state employees constitute public funds. TEX.ATT'Y GEN.OP. NOS. JM-431 (1986), MW-373 (1981), MW-89 (1979), H-1309 (1978). The use of buildings or facilities that belong to the state constitutes receipt of public funds. TEX.ATT'Y GEN.OP. NO. MW-373. Even reimbursement of expenses for service on a committee constitutes receipt of public funds. TEX.ATT'Y GEN. ORD-273 (1981). The state-supported universities are agencies of the state whose funds belong to the State of Texas, i.e., are public funds. TEX.EDUC. CODE ANN. § 51.002 (Vernon 1972); *Walsh v. University of Texas,* 169 S.W.2d 993, 993-94 (Tex.Civ. App.—El Paso 1942, writ ref'd); *see also Lowe v. Texas Tech University,* 540 S.W.2d 297-98 (Tex.1976) (*citing Walsh,* 169 S.W.2d 993); *Bache Halsey Stuart Shields, Inc. v. University of Houston,* 638 S.W.2d 920, 923-25 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.); *Lyons*

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3. Section 7 of the Act charges the Attorney General with the obligation of interpreting the Act. TEX.REV.CIV.STAT.ANN. art. 6252-17a, § 7 (Vernon Supp.1986). Consequently, Texas courts have consistently accorded great, though not conclusive, weight to the General's opinions. *City of Houston v. Houston Chronicle Publishing Co.,* 673 S.W.2d 316 (Tex.Civ.App.—Houston [14th Dist.] 1984, no writ); *Smith v. McCoy,* 533 S.W.2d 457 (Tex.Civ.App.—Dallas 1976, writ dism'd).

v. Texas A & M University, 545 S.W.2d 56, 58 (Tex.Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.). *See Bd. of Regents of the University of Oklahoma v. NCAA,* 546 F.Supp. 1276, 1303 (W.D. Okla.1982), *aff'd,* 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed2d 70 (1984). Funds generated by the athletic departments of State universities, characterized as auxiliary enterprise funds, are also public funds of the State of Texas. TEX.ATT'Y GEN.OP. NOS. O-1662 (1940), V-715 (1948), H-456 (1974).

Because an organization receives public funds does not necessarily mean that it is "supported in whole or in part by public funds," and is therefore subject to the terms of the Act. Private persons or businesses are not subject to the Act merely because they provide specific goods or services pursuant to a contract with a governmental body, TEX.ATT'Y GEN. ORD-302 (1982), ORD-228 (1979), ORD-1 (1973). If a contract imposes a specific and definite obligation on the private contractor to provide "a measurable amount of service in exchange for a certain amount of money as would be expected in a typical arms length contract for services between a vendor and purchaser . . . ," the private contractor will not be subject to the Act. ORD-302 (1982). Further, the contract must contain no provision which either indicates a common purpose or objective between the purported governmental body and the public entity with which it contracts, or could be construed as constituting an agency-type relationship. TEX.ATT'Y GEN. ORD-228 (1979). Finally, it is apparent from transcripts of the House debates that private persons and entities were intended to come within the coverage of the Act as shown by the following passage:

REP. CLAYTON: Mr. Denton, I am concerned about Section 2 on page 10, where we are setting out there that part, section or portion of every organization, corporation, commission, committee, institution or agency which is supported in all or in part by public funds. What bothers me in this particular language, I'm thinking about [a] corporation. Say, for instance, if we were concerned with maybe STECK who does a lot of contract work for the State in printing matters. Would this bill subject them to throwing their records open to the public simply because a part of their support is due to state contracts?

REP. DENTON: This is the part I understand, and I certainly think there would be due concern; but it would be only those records pertaining to that state contract. Expenditure of state funds, public funds as used in this, shall mean the funds of the State of Texas. So I would only use the expenditure of that particular part.

REP. CLAYTON: Where do we see that at?

REP. DENTON: Line 13. This was added in subcommittee. The Amendment, Mr. Clayton, in H.R. 6 went to State Affairs Committee, did not include the Senate. Public funds as used herein means the funds of the State of Texas. That was added by subcommittee.

Transcript of House Debates at 23-24; *accord* TEX.LEG. COUNCIL, Reform Legislation: *Text, Analysis and Forms* at 99 ("nearly every unit of government . . . as well as organizations which are not necessarily governmental, but are supported in whole or in part with public funds . . . " included in definition of "governmental body").

The contractor will be subject to the terms of the Act if *any* portion of the public funds paid to the contractor

are paid for the general support of the contractor under *any* provision of the contract, and are not attributable to specific payment for specific measurable services. ORD-302 (1982), ORD-228 (1979).

VI. APPLICATION OF THE ACT TO THE NCAA

A. *Extra-territorial Application*

The NCAA argues the Act has no extra-territorial application. In *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182 (Tex. 1968), the Supreme Court held that the Texas Wrongful Death Statute had no extra-territorial jurisdiction. The Court based its decision on three factors: the statute expressed no such intent; Texas Courts had "repeatedly held that the statute had no extraterritorial effect;" and, despite such rulings from the Courts the legislature had re-enacted the statute a number of times with no amendment. *Id.* at 187. Thus, the Court concluded that the legislature did not intend that the statute be given extra-territorial effect. In determining the territorial limits of the statute, the Court cited the following rule:

> "Implied Territorial Limitations.—Unless the intention to have a statute operate beyond the limits of the state or country is *clearly expressed or indicated by its language, purpose, subject matter, or history,* no legislation is presumed to be intended to operate outside the territorial jurisdiction of the state or country enacting it. To the contrary, the presumption is that the statute is intended to have no extraterritorial effect, but to apply only within the territorial jurisdiction of the state or country enacting it, and it is generally so construed. An extraterritorial effect

> is not to be given statutes by implication. * * ** " (50 Am. Jur. 510. Statutes § 487).

Marmon, 430 S.W.2d at 187. (Emphasis added).

The cardinal rule of statutory construction is to determine the intent of the legislature and give effect to that intent. *Knight v. International Harvester Credit Corp.,* 627 S.W.2d 382, 384 (Tex.1982). Legislative intent is determined by an analysis of the statute as a whole, rather than through scrutiny of isolated portions. *Taylor v. Firemen's & Policemen's Civil Service Commission,* 616 S.W.2d 187, 190 (Tex.1981). If a statute is clear and unambiguous, extrinsic aids and rules of construction are inapplicable, and words shall be given their common, everyday meaning. *Cail v. Service Motors, Inc.,* 660 S.W.2d 814, 815 (Tex.1983); *Minton v. Frank,* 545 S.W.2d 442, 445 (Tex.1976). Finally, the Court should give the statute a reasonable construction to avoid injustice or an absurd result. *Gulf Ins. Co. v. James,* 143 Tex. 424, 185 S.W.2d 966, 969 (1945).

No provision of the Act expressly gives it extraterritorial application, nor have Texas courts ruled on the extraterritorial effect of the statute. The language, subject matter and purpose of the Act, however, do evince a clear intent that the Act be given extraterritorial application. The Act is designed to guarantee to the citizens of the State of Texas "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." TEX.REV.CIV. STAT.ANN. art. 6252-17a, § 1 (Vernon Supp.1986). The provisions of the Act are to be liberally construed so that the policy of the act may be carried out.

Id. Section 2(1)(F) defines a governmental body as the part, section or portion of *every* organization . . . or agency which is supported in whole or in part by public funds, or which expends public funds. *Id.* (emphasis added). The word "every" means "each individual or part of a group without exception. . . ." WEBSTER'S NEW COLLEGIATE DICTIONARY 393 (1979). By using the word "every" the legislature evinced an intent to apply the Act to both in-state and out-of-state corporations or associations. The sole requirement under the Act is that the entity in question receive some support in the form of Texas public funds. If the particular entity falls within the definition of governmental body contained in the Act, its geographic location is irrelevant.

It would be illogical for the Court to find that the purpose of the Act is to ensure public access to information concerning the affairs of government, but then hold that the Act does not apply to foreign entities who fall within the definition of governmental body contained in the Act. Further, to end application of the Act at the State's borders would severely cripple the purpose of the Act. Those defined as governmental bodies under the Act could avoid its application by merely incorporating outside of the State's boundaries. The public would then be denied information concerning the expenditure or use of its funds despite the clear purpose of the Act.

B. *Choice of Law*

The NCAA next argues that Texas law does not apply to this case because choice of law principles preclude application of the Act to the NCAA.

When the Court exercises its pendent jurisdiction over Texas state law claims, it must apply Texas choice of law rules. *United Mineworkers v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). Texas courts employ the "most significant relationship" test in all choice of law cases. *Duncan v. Cessna Aircraft Co.,* 665 S.W.2d 414, 421 (Tex. 1984); *see Gutierrez v. Collins,* 583 S.W.2d 312, 318-19 (Tex.1979). The law of the state with the most significant relationship to the issue in this case will be applied to resolve the issue. *Duncan,* 665 S.W.2d at 421. The State of Texas has the most significant contacts in this case: the Plaintiffs are residents of Texas; eight of the nine members of the SWC are located in Texas; and the NCAA conducted a number of investigations which uncovered the information sought by Plaintiffs in Texas. Consequently, this Court is of the view that the law of Texas applies to this case.

C. *Receipt of Public Funds*

Plaintiffs argue that the NCAA receives public funds for its general support from Texas state-supported universities in three specific forms: dues payments; assessments against the universities' football television gross rights fees; and, costs, expenses and salaries absorbed by the universities when they host NCAA tournaments and championship meets, and when they allow state employees to work for the NCAA without reimbursement. First, the Court must determine whether the funds described above are "public funds;" if not, the inquiry ends. If they are public funds the Court must determine whether the NCAA's Bylaws and constitution impose a "specific and definite obligation" on the NCAA "to provide a measur-

able amount of service in exchange for a certain amount of money," i.e., the funds described above. If the NCAA does not receive public funds for its general support it is not subject to the Act. TEX.ATT'Y GEN. ORD-228 (1979).

NCAA dues are paid from the auxiliary enterprise accounts of the state universities. The funds contained in these accounts belong to the State of Texas, i.e. are public funds. TEX.ATT'Y GEN.OP. NOS. 0-1662 (1940), V-715 (1948). NCAA Bylaw 9, section 3(a) states that annual dues are intended to cover the costs of "association publications, convention operations, establishment and maintenance of playing rules, and compilation of statistics." *Id.* These vague and amorphous provisions in no way impose a specific duty on the NCAA to return a measurable service in return for these funds. Rather, they are used to cover the general operating expenses. Attorney General Opinion JM-116 reached a similar conclusion. The Attorney General found that a state universities payment of annual membership dues to an intercollegiate athletic association were sufficient to subject the association to the Act. TEX.ATT'Y GEN.OP. JM-116 (1983). Similarly, this Court finds that the NCAA's receipt of annual dues payments from state-supported universities provides a basis for determining that the NCAA is a "governmental body" as defined by the Act.

NCAA Bylaw 8, section 2(c) provides for a 4% television gross rights fee assessment. The rights to televising games are owned by the member-universities who participate in that game. *See Board of Regents of University of Oklahoma v. National Collegiate Athletic Association,* 546 F.Supp. 1276, 1326 (W.D.Okla.1982), *aff'd,* 468 U.S.

85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984). Football television rights and fees owned by state-supported universities are property of the state and become public funds. *Rhoads,* 70 S.W.2d at 576; *Goggans,* 319 S.W.2d at 445; *see Womack,* 172 S.W.2d at 308.

The NCAA argues pursuant to Bylaw 8-2-(c) that it is contractually entitled to its share of the telecast revenues before any member university has arranged to have its games televised. They argue that the university holds 4% of the gross rights fee in trust for the benefit of the NCAA; consequently, the 4% assessment does not constitute public funds. Revenues from television broadcasts are derived from contracts negotiated by the television networks and the universities, owner of the television rights. The NCAA has no contractual relationship with the television networks; the revenues the networks are obligated to pay are not owed to the NCAA. Merely because payment of a debt is to be calculated on the basis of a percentage of income derived by the obligor from a third party does not render the obligor a trustee, and does not change a purely contractual debt relationship into a trust. *McCord v. Fort Worth National Bank,* 275 S.W.2d 717, 719 (Tex.Civ.App.—Ft. Worth 1955, writ ref'd n.r.e.). Even if the NCAA were correct in its allegation of trust relationship, television revenues are still public funds. It is undisputed that in the first instance the television rights belong to the member universities. No matter how the NCAA has obtained its ownership interest in the funds, it has received public funds. The question then becomes whether the public funds were exchanged for a specific measurable amount of services.

Bylaw 8-2-(c) states that the assessments fund the costs of "the NCAA post-graduate scholarship program and football-related services of the NCAA." The bylaw does not specify the amount, number or beneficiary of the scholarships or scholarship. Further, the bylaw does not indicate what constitutes a "football-related service." The 1981 Football Television Briefing Book, a publication of the NCAA, does indicate, however, that the assessment "funds the NCAA postgraduate scholarship program, football promotion, television administration, sports development and general administration. . . ." There is no evidence that the NCAA has changed this application of funds. It is clear that the assessments, like the dues revenues, are used for the general support of the NCAA and are not exchanged for specific measurable services. The NCAA's receipt of the assessment provides another basis for determining that the NCAA is a "governmental body" as defined by the Act.

NCAA Executive Regulation One governs championship events and tournaments. The regulation authorizes reimbursement for some expenses but specifically prohibits reimbursement of the following:

1. On-campus facility rental charges;
2. The cost of permanent equipment;
3. Local transportation of competing teams;
4. Salaries of athletic department staff members who administer the tournament;
5. Salary of the institution's athletic director, who is on the game committee that supervises the athletic department staff in administering the event; and
6. Any costs that exceed the approved budget.

NCAA Regulation 1, §§ 2(e), 8(d)(1), 12. Because the costs outlined above are not reimbursed by the NCAA, they are necessarily paid with public funds by the state-supported university which has hosted the event. Accordingly, the public funds are necessarily expended in connection with the NCAA's tournaments and championship events. The NCAA gives nothing in exchange for these particular public funds. The Court is of the opinion that these funds are used for the general support of the NCAA, therefore the NCAA falls under the definition of governmental body and is subject to the Act.

Relying on the definition of "governmental body," the NCAA alleges that the Enforcement Division is that "part" of the Association which maintains the information sought by Plaintiffs. They argue that because this "part" of the Association is not supported in whole or part by public funds, it is not subject to the terms of the Act and cannot be compelled to release the information. Their argument must fail for two reasons. The NCAA's interpretation of the definition would allow each and every entity, otherwise defined as a governmental body under the Act, to avoid application of the Act by establishing an independent source of funding for that portion of the entity which maintained its records. In light of the liberal construction which the Act must be given and the fact that this interpretation would effectively thwart the purpose of the Act, the Court must reject the NCAA's contention. Second, even if the NCAA were correct in its argument, it admits that the Enforcement Division is funded by championship events and tournaments. The Court has already determined that a portion of these revenues are

public funds of the State of Texas.[4] Consequently, the NCAA's argument must fail. Further, the Court would note that the NCAA comingles all sources of its revenue in a simple bank account. According to the testimony of the NCAA's Controller it would be difficult, if not impossible, for the NCAA to determine which revenue paid which expenditure. In fact, the Controller testified that the NCAA spent more on the items which the bylaws indicate will be supported with dues revenue, than was collected in dues revenue. Consequently, the Court is of the opinion that all departments of the NCAA are supported in part by public funds of the State of Texas. The Court is of the opinion that the NCAA is a governmental body as defined by the Act for the reasons stated above.

Further, the Court is of the opinion that the information requested of the NCAA is public information. The Act defines public information as: "All information collected, assembled or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business . . ." TEX.REV.CIV. STAT.ANN. art. 6252-17a § 3(a) (Vernon Supp. 1986).

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4. The Court would note that the definition of governmental body contained in the Act refers to entities "supported in whole or in part by public funds. . . ." The NCAA argues that the funds received from Texas state-supported universities are a minute percentage of their overall budget and do not contribute significantly to their overall budget. Given its plain, everyday meaning the word "part" denotes one of several subdivisions which together constitute a whole. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 828 (1979). Relying upon this definition the Court is of the opinion that any percentage, no matter how great or small, constitutes "support . . . in part" under the Act. Consequently, the amount of support contributed to the NCAA, or the SWC for that matter, is irrelevant to the Court's inquiry.

Clearly the records sought by the Plaintiffs were collected, assembled or maintained by the NCAA in connection with the transaction of the NCAA's official business. There is no support for the NCAA's contention that "official business" is limited to the authorized business of the State of Texas. This Court is of the opinion that the term "official business" includes the official business of any entity which falls under the definition of governmental body. *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 676 (Tex.1976); TEX.ATT'Y GEN.OP. NO. JM-116 (1983).

VII. APPLICATION OF THE ACT TO THE SWC

The SWC is a resident of Texas; therefore, there is no question of extraterritorial application or choice of law. The question, therefore, is whether the SWC received public funds. The testimony of the Commissioner of the SWC indicates that the Conference derives all of its income from the athletic events of its member schools, four of which are state-supported universities. The principle revenues of the SWC are derived from receipt of television gross rights fees assessments as provided in Article 9.04 of the Conference Bylaws. From 1981 through 1985, the SWC received in excess of four million dollars through application of this formula.

Once again, the first issue is whether the funds described are "public funds;" if not, the Court's inquiry ends. If they are public funds the Court must determine whether the SWC is under a "specific and definite obligation" to provide a measurable amount of service in exchange for a certain amount of money, i.e., the funds described above. If the funds are received for the general

support of the SWC, the Conference is subject to the Act. TEX.ATT'Y GEN. ORD-228 (1979).

As noted earlier, football television rights are owned by the universities that participate in the game. 546 F.Supp. at 1326. The gross rights fees of state-supported universities are property of the State and become public funds. *Rhoads,* 70 S.W.2d at 576; *Goggans,* 319 S.W.2d at 445.

Clearly, the SWC received public funds. The Court must now determine whether the SWC receives the funds from its member state-supported universities for its general support or whether they are received in exchange for a specific measurable service. MW-308.

The SWC argues that it holds the funds as an agent-trustee for the benefit of the school and vice versa. The basis of their argument is that "an agency or trust relationship exists when one party collects or disburses money on behalf of another party." As was the case with the NCAA's trust argument, this argument must also fail. The Court is of the opinion that the obligation imposed upon the SWC member institutions by the SWC Bylaws amounts to a contractual obligation to convey a certain percentage of revenue received to the SWC.

The funds are not received by a member institution as an agent of the SWC and the member-universities do not stand in a position of trustee. Rather, the member institutions have a separate contractual obligation to the SWC dependent upon another contract. The fact that a percentage of revenue from one contract must in turn be paid to a third party does not create a trust under Texas law. *McCord,* 275 S.W.2d at 719; *see also Frank v. Gaffney,* 2 S.W.2d 885, 886 (Tex.Civ.App.—Galveston 1928).

Next, the SWC argues that its receipt of these funds is merely a typical contract for services. In order to test this argument the Court must determine whether the agreement by which the funds are transferred imposes a specific and definite obligation on the SWC to provide a measurable amount of service in exchange for a certain amount of money, as would be expected in a typical arms-length transaction. TEX. ATT'Y GEN.ORDS. 228, 302. Further, the agreement pursuant to which the funds are paid must contain no provision which either indicates a common purpose or objective between the SWC and the state-supported universities, or could be construed as constituting an agency relationship. *Id.* ORD. 228.

The Constitution and Bylaws of the SWC pursuant to which the funds in question are transferred, contain no provision which imposes a specific or definite obligation on the Conference to provide a measurable amount of service in exchange for the funds. The Constitution and Bylaws speak only in general terms relating to the general support of the Conference. *E.g.,* SWC Bylaws art. XIX. Further, the Conference itself consists of university members. An agreement cannot be characterized as "at arms length" when a faculty representative agrees that his University should pay funds to an organization of which he is a governing member.

Moreover, it is clear that the SWC shares a similar common interest and objective with its state-supported university members. In fact, the Conference acts as an agent for the universities in some instances. In JM-116, the Attorney General applied the "common interest" test and determined that the Gulf Star Athletic Conference shared similar goals and objectives with its member uni-

versities and therefore did not pass the test developed in ORD-228. A comparison of the Gulf Star and SWC purpose clauses indicates that their goals and objectives are virtually identical. *Compare* TEX.ATT'Y GEN.OP. NO. JM-116 *with* SWC CONST. Art. II.

Besides having a common purpose it is apparent that the funds paid to the SWC by the member universities are used to support the general operation of the Conference. The SWC Commissioner testified that the Conference percentage of television revenues was used to support the general operation of the Conference. It is clear, therefore, that the Conference receives state funds for its general support which are not paid as a result of a typical arms-length transaction.

The record further shows additional general support by state government for the Conference. The SWC is governed by a nine member board of faculty representatives. Each school provides one representative. The Conference Constitution required that the representative must either be on the faculty or have faculty status at a member institution. SWC CONST. art. VII. An Executive Committee oversees the day-to-day operations of the Conference and approves its budget. *Id.* art. X. The Committee presently consists of President Michael Johnson, faculty representative from the University of Houston, a state-supported school, Vice-President Bob Sweazy, faculty representative from Texas Tech, a state-supported school, Past President Edwin Horner, Baylor University, a private school, Frank Broyles, athletic director at the University of Arkansas, an out-of-state public school, and athletic director DeLoss Dodds of the University of Texas, a state-supported school. Neither the faculty representa-

tives nor the Executive Committee members receive compensation from the SWC despite the fact that the SWC Commissioner characterized Mr. Johnson's conference duties as "substantial." Thus, four members of the governing board of the SWC must be Texas public employees. Three of the current members of the Executive committee including the president and vice president are Texas public employees. Dr. Johnson, the President, has received added compensation from the University of Houston by the reduction of his teaching load to compensate him, in part, for his service as faculty representative to the SWC. In addition, the University of Houston has maintained an executive liability and indemnification policy covering Dr. Johnson's activities with the SWC. It is undisputed that these state employees support the work of the Conference. Use of state employees in this manner constitutes receipt of public funds under Texas law. TEX.ATT'Y GEN.OP. NOS. JM-431 (1986), MW-89 (1979), H-1309 (1978). Clearly, receipt of of this form of public funds goes to the general support of the Conference.

The Court is of the opinion that the funds received by the SWC from state supported universities are public funds, and that the Act applies to the SWC by its express terms. Further, it is clear that the "state funds" received by the SWC are used for its general support.

Finally, the Court finds that the information sought by Plaintiffs was collected, assembled and maintained by the SWC in connection with the transaction of its official business. Consequently, the Court is of the view that the information is "public information." *See* TEX.REV.CIV. STAT.ANN. art. 6252-17a §3(a) (Vernon Supp.1986); *Industrial Foundation,* 540 S.W.2d at 676; TEX.ATT'Y GEN.OP. NO. JM-116.

VIII. SUMMARY

The Court is of the opinion that both Defendants are governmental bodies within the meaning of the Act, and that the information sought by Plaintiffs is public information within the meaning of the Act. Accordingly, the Court hereby Orders that the Defendants produce the information sought by the Plaintiffs to the Court, within twenty (20) days of the date of this Order, for an *in camera* inspection which will be conducted for the purpose of determining whether any of the exceptions listed in section 3 of the Act prevent disclosure of the information sought. TEX.REV.CIV.STAT.ANN. art. 6252-17a, §§ 3, 7 & 8 (Vernon Supp.1986).

Along with the information submitted for *in camera* review, the Court hereby Orders that the Defendants note within which exception each piece of information falls. Further, the Court will require that the Defendants file a brief setting out those cases, opinions or decisions which support their claims within twenty (20) days of the date of this Order. Plaintiffs will have ten (10) days from their receipt of Defendants' briefs to respond.

Further, the Court finds that the Plaintiffs have failed to establish that the Defendants acted under color of state law when they refused Plaintiffs' requests for information. Accordingly, the Court hereby enters Judgment in favor of the Defendants on Plaintiffs' claims brought under 42 U.S.C. section 1983.

Carole KNEELAND, Belo Broadcasting Corporation, the Times Herald Printing Company, David Eden and A.H. Belo Corporation d/b/a Belo Corporation News

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION and Southwest Athletic Conference.

Civ. No. A-85-CA-616.

United States District Court,
W.D. Texas,
Austin Division.

Aug. 18, 1986.

Disclosure of information from national association for collegiate athletics was sought under Texas Open Records Act. The District Court, Nowlin, J., held that: (1) extraterritorial application of Act to association was constitutional; (2) any privacy right which association could assert was outweighed by interest in disclosure; (3) application of Act did not infringe upon any interest in academic freedom or freedom of association; (4) *Pullman* abstention was not appropriate; and (5) Act was not unconstitutional under Texas Constitution's separation of powers articles.

Ordered accordingly.

See also 650 F.Supp. 1047, 650 F.Supp. 1076.

Jack Balagia, Jr., James R. Raup, McGinnis, Lochridge & Kilgore, Austin, Tex., for plaintiffs Carole Kneeland and Belo Broadcasting Corp.

William D. Simms, Paul C. Watler, Jenkens & Gilchrist, Dallas, Tex., for plaintiff-intervenor A.H. Belo Corp. d/b/a The Dallas Morning News.

Frank C. Vecella, Charles L. Babcock, Michael Knapek, Jackson, Walker, Winstead, Cantwell & Miller, Dallas, Tex., for plaintiffs-intervenors the Times Herald Printing Co. and David Eden.

Robert M. Roller, Graves, Dougherty, Hearon & Moody, Austin, Tex., for defendant Nat. Collegiate Athletic Ass'n.

Robert F. Middleton, Baker, Smith & Mills, Dallas, Tex., for defendant Southwest Athletic Conference.

ORDER

NOWLIN, District Judge.

The above-styled and numbered cause came before the Court on July 24, 1986 for a non-jury trial.

BACKGROUND

This action was originally filed in state court on October 3, 1985, and removed to this Court by both Defendants on October 25, 1985. After a pre-trial conference held on February 6, 1986, the Court granted Defendant NCAA's Motion for Separate Trial on the issue of whether Defendants were governmental bodies as defined by the Act and the Plaintiffs' claims brought under 42 U.S.C. § 1983. A non-jury trial was held on March 6 and 7, 1986. On May 15, 1986, 650 F.Supp. 1047 the Court entered a Memorandum Opinion and Order which denied the Plaintiffs' section 1983 claims, determined that both Defend-

ants are governmental bodies within the meaning of the Act, and that the information sought by Plaintiffs is public information within the meaning of the Act. The Order directed that the Defendants produce the information sought by Plaintiffs to the Court for an in camera inspection within twenty days from the date of the Order so that the Court could determine whether any exemptions listed under section 3 of the Act prevented disclosure of the information sought. The Court further required that the Defendants file briefs concerning any exceptions to disclosure available under the Act.

On May 22, 1986 the Defendants filed a Joint Motion to Amend the Court's Order and to Certify an Immediate Appeal to the Circuit Court. On May 30, 1986 the Defendants filed a Motion for Additional Time to Comply with the Court's Order. On June 2, 1986 the Southwest Conference filed a Motion to Vacate the Court's Opinion and Dismiss the Pendent Claims, or in the Alternative, to Remand. On June 3, 1986 the Defendants moved for return of the documents following *in camera* inspection and for conditional stay. The Court granted the Defendants' Motion for Extension of Time and ordered that the documents in issue be submitted to the Court on or before Friday, June 20, 1986 at 5:00 p.m. On June 16, 1986 the Court entered an order which denied the Defendants' Motion to Amend and to Certify an Immediate Appeal and for Stay. On that same day the NCAA filed its Notice of Appeal of the Court's Order of May 16, 1986. June 17, 1986 saw a great deal of activity in this case. The Court denied Defendant Southwest Athletic Conference's Motion to Vacate Opinion and Dismiss Pendent Claims, or in the Alternative, to Remand. In that Order, the Court noted

that following removal of this cause neither Defendant had moved to dismiss the section 1983 claim and remand the state claims. Further, the Order noted that at the trial conducted by the Court the Defendants conceded that this Court had pendent jurisdiction over the Plaintiffs' state law claims. The Court also entered an order which denied the Defendants' Motion for Return of Documents following *in camera* inspection, but granted the motion insofar as it sought protection of the documents pending any appeal of this Court's final order. Finally, the Court scheduled trial of any remaining issues in this case for Thursday, July 24, 1986. On that same day, June 17, 1986, the NCAA moved to stay proceedings in this action pending a decision on a petition for writ of mandamus which they had filed in the United States Court of Appeals for the Fifth Circuit. On June 19, 1986 the United States Court of Appeals for the Fifth Circuit denied the Defendant's petition; therefore, the Court denied the Motion to stay these proceedings as moot.

Pursuant to the Court's scheduling order of June 17, 1986, the parties, with the exception of the SWC, timely filed briefs concerning the remaining issues in this case. The SWC did not submit a brief to the Court.

I. REMAINING ISSUES

The NCAA asserts some thirty-six (36) defenses in its amended answers. The SWC asserted six (6) affirmative defenses in its amended answer, all of which are also asserted by the NCAA. The NCAA's brief on the remaining issues argues the following five (5) specific defenses:

1. Application of the Act would violate the First, Fifth and Fourteenth Amendments to the United

States Constitution and similar provisions of the Texas Constitution.

2. The member institutions should be joined as necessary parties before the Court proceeds.

3. The Court should abstain.

4. The intervenors and Plaintiffs have failed to establish the necessary prerequisites to relief under the Act.

5. The NCAA has a privacy right in the information sought and the documents are protected by a self-critical analysis privilege.

II. FIRST, FIFTH AND FOURTEENTH AMENDMENT DEFENSES

The NCAA devotes a majority of its argument to allegations that application of the Act violates specific provisions of the United States and Texas Constitutions. Basically, the NCAA asserts three arguments in support of their contentions: First, extraterritorial application of the Act is an unconstitutional infringement by the State of Texas on the private affairs of a Kansas organization; second, the Act provides for an unconstitutional taking of the NCAA's property for private purposes; and, third, the Act infringes the NCAA's fundamental rights of privacy, association and academic freedom without furthering any compelling state interests.

A. *Extraterritorial application*

On May 15, 1986, this Court ruled that the Act was intended to have extraterritorial effect, and that the Act applies to the NCAA. Nevertheless, the NCAA now argues that application of the Act to the NCAA is unconstitutional. In support of its position that the Texas Legisla-

ture cannot constitutionally regulate the affairs of a foreign association, the NCAA cites *Austin Building Co. v. National Union Fire Insurance Co.*, 432 S.W.2d 697 (Tex.1968). In *Austin Building,* the Plaintiff, a Texas corporation, sued the Defendant insurance company for damages sustained in a fire in Kansas. The issue before the Court was one of choice of law. The Court found that the insurance contract in issue was made in Kansas with a Kansas citizen, would be performed in Kansas, related to property located in Kansas, and that the parties intended that Kansas law would apply. Therefore, the Court held that Kansas law would control interpretation of the contract under the doctrine of *lex loci. Id.* at 701. In the instant case the statute in issue does not attempt to regulate contracts, but rather ensures public access to information concerning the affairs of government and the expenditure or use of State funds. Further, the NCAA has had significant, indeed the most significant, contacts with the State of Texas. The NCAA consistently enters Texas to conduct its business. It has conducted numerous investigations within the State of Texas, often employing Texas residents to conduct such investigations. The documents and information sought by Plaintiffs and Intervenors admittedly came to light pursuant to investigations conducted within the State by NCAA representatives. Finally, the most important, the NCAA receives and expends public funds of the State of Texas. These facts distinguish and render inapposite *Austin Building Co. v. National Union Fire Insurance Co., Id.* The Act was intended to have extraterritorial effect in pursuit of the clear and legitimate public policy stated in the Act.

If, as interpreted by Plaintiff, the NCAA argues that the full faith and credit clause of the United States Con-

stitution bars extraterritorial application, the Court would note that the clause does not require application of another state's law in violation of Texas' own legitimate public policy. *Nevada v. Hall,* 440 U.S. 410, 422, 99 S.Ct. 1182, 1189, 59 L.Ed.2d 416 (1979); *Pacific Employers Insurance Co. v. Industrial Accident Commission,* 306 U.S. 493, 501-02, 59 S.Ct. 629, 632-33, 83 L.Ed. 940 (1939); *Garcia v. Total Oilfield Services, Inc.,* 703 S.W.2d 411, 414-15 (Tex. App.—Amarillo 1986, writ ref'd n.r.e.). If the NCAA argues that the full faith and credit clause demands application of Kansas law, it "assumes the burden of showing, upon some rational basis, that the conflicting interests . . . of the foreign state are superior to those of the forum." *Alaska Packers Association v. Industrial Accident Commission,* 294 U.S. 532, 547-48, 55 S.Ct. 518, 523-24, 79 L.Ed. 1044 (1935). When the public interest of the forum state in the persons, property or events subject in the litigation outweigh the interests of the foreign state, there is no denial of full faith and credit. *Id.* In this case the NCAA has not even attempted to meet this burden. This litigation involves Texas residents, Texas state universities and student athletes, and a legitimate Texas public policy. These factors clearly outweigh any policy Kansas might have to protect associations which do extensive business in Texas and receive and expend Texas public funds. Accordingly, the Court is of the opinion that extraterritorial application of the Act is constitutional.

B. *Unconstitutional Taking*

The NCAA argues that application of the Act results in an unconstitutional taking of private property for a private purpose in violation of the United States and

Texas Constitutions. This argument ignores this Court's May 15, 1986 Order which found that the NCAA met the definition of governmental body under the Act, and that the information requested under the Act is public information. The Court is not inclined to reconsider its prior determination; therefore, the NCAA's argument must fail because the information requested is not "private property," but rather public information. Moreover, the NCAA fails to explain how the Plaintiff's and Intervenor's review of public information could possibly result in an unconstitutional "taking." The disclosure sought neither prevents the NCAA from using the information in issue, nor diminishes some advantage which the NCAA holds over some competition. The NCAA has simply failed to demonstrate that an unconstitutional taking would occur. This raises yet another point: A taking could not possibly occur until the Court reviews the information sought and determines which, if any, documents must be disclosed. To this extent the NCAA's argument is premature.

Even if the court presumed that a "taking" of "private property" occurred, the taking is for a legitimate public purpose and not for "private use." One person's property can be taken, even for the benefit of another private person, so long as there exists a justifying public purpose. *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 241, 104 S.Ct. 2321, 2329-30, 81 L.Ed.2d 86 (1984). Once the Legislature has declared the "public interest" the Courts consider the declaration "well-nigh conclusive." *Berman v. Parker,* 348 U.S. 26, 32, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954). Thus, the public use requirement is considered coterminous with the state's public

powers. *Hawai Housing Authority,* 467 U.S. at 240, 104 S.Ct. at 2329. The courts must defer to the legislature's determination "until it is shown to involve an impossibility." *Old Dominion Land Co. v. United Statts,* 269 U.S. 55, 66, 46 S.Ct. 39, 40, 70 L.Ed. 162 (1925). The expressed purpose of the Act sets forth a legitimate and vital public interest, disclosure of information concerning the affairs of governmental bodies and the expenditure and use of public funds. Specifically, the information sought in this action also concerns a legitimate public concern; athletic recruiting violations in Texas universities. As noted by the NCAA, "a fundamental purpose of the NCAA is to maintain 'intercollegiate athletics as an integral part of the education program.' *Justice v. National Collegiate Athletic Association,* 577 F.Supp. 356, 361 (D.Ariz.1983)." In this Court's view there is no more vital or legitimate public concern than the education of this State's citizens. The NCAA's "taking" argument is without merit.

C. *Fundamental Rights*

The NCAA next argues that its "fundamental rights" to privacy, freedom of association and academic freedom are violated by application of the Act and that the Plaintiff must therefore demonstrate a compelling state interest which justfies the Act. The NCAA appears to assert a substantive due process argument which would require that the Plaintiff demonstrate that the Act is necessary to promote a compelling State interest.

The first step in an analysis of the NCAA's claims is to determine the nature of the rights affected by the Act. The Court must apply strict scrutiny to a statute only when the legislation involves some suspect classifi-

cation or touches upon some fundamental right. *Mathews v. Lucas,* 427 U.S. 495, 506, 96 S.Ct. 2755, 2762-63, 49 L.Ed.2d 651 (1976); *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 28, 93 S.Ct. 1278, 1294, 36 L.Ed.2d 16 (1973) ... Where no fundamental rights are affected, the statute need only rationally relate to some legitimate state interest. *Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 471, 489, 97 S.Ct. 1898, 1908-09, 52 L.Ed.2d 513 (1977); *see Pappanastos v. Board of Trustees,* 615 F.2d 219, 221 (5th Cir.1980). The NCAA's argument is based upon the premise that the NCAA itself enjoys the rights of privacy, association, and academic freedom. The Court is of the opinion that this premise is incorrect.

1. *Privacy*

All of the parties to this action concede that the NCAA has standing to assert a right of privacy on behalf of those individuals whom its files concern. *Industrial Foundation of South v. Industrial Accident Board,* 540 S.W.2d 668, 678 (Tex. 1976). The NCAA, however, goes one step further and argues that it has a constitutional right to privacy, essentially equivalent to individuals, which would bar application of the Act. Plaintiffs and Intervenors argue that the NCAA has no such privacy right.

The constitutional right to privacy is a developing concept which remains substantially undefined. *Whalen v. Roe,* 429 U.S. 589, 599 n. 24, 97 S.Ct. 869, 876 n. 24, 51 L.Ed.2d 64 (1977). "The cases sometimes characterized as protecting 'privacy' have in fact involved two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the in-

terest in independence in making certain kinds of decisions" *Id.* at 598-600, 97 S.Ct. at 876; *e.g. Nixon v. Administrator of General Services,* 433 U.S. 425, 457, 97 S.Ct. 2777, 2797, 53 L.Ed.2d 867 (1977). Certainly, that line of cases recognizing the right to privacy in making certain kinds of decisions does not apply to the NCAA. *Bowers v. Hardwick, et al.,* — U.S. —, — - —, 106 S.Ct. 2841, 2842-44, 92 L.Ed.2d 140 (1986). This line of cases concerns matters of child rearing and education, family relationships, procreation, marriage, contraception and abortion. *Id.* Thus, the NCAA must find support for its argument in that line of cases which prevents disclosure of personal matters.

Assuming the NCAA's argument that corporations, like individuals, are accorded privacy protection under this line of cases, their privacy rights are not equivalent to those of an individual. *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 779 n. 14, 98 S.Ct. 1407, 1416-17 n. 14, 55 L.Ed.2d 707 (1978); *California Bankers Association v. Shultz,* 416 U.S. 21, 65-66, 94 S.Ct. 1494, 1519-20, 39 L.Ed. 2d812 (1974); *Tavoularess v. Washington Post Co.,* 724 F.2d 1010, 1021-22 (D.C.Cir.1984). The extent of a corporation's privacy interest is determined on a case by case basis by balancing the need for disclosure against the invasion occasioned by the disclosure. *Tavoularess,* 724 F.2d at 1023. Less severe intrusions will more likely result in disclosure. *See id.* Only rare cases involving disclosure of trade-secrets and confidential *commercial* information have required demonstration of a compelling interest before disclosure would be allowed. *Id.*

In arguing that their interests outweigh the need for disclosure, the NCAA argues that it would be irreparably

harmed by disclosure in that its internal rules would be "emasculated," and that innocent third persons might be harmed by disclosure of unverified information. This must be balanced against the interest in disclosure; the public's interest in full and complete disclosure of information concerning the affairs of governmental bodies as defined by the Act.

First, the NCAA cannot assert possible harm to unrelated third parties in asserting its own privacy interest. It does have standing to raise such interests in claiming an exemption under the Act, *Industrial Foundation*, 540 S.W.2d at 678, but this is irrelevant to an assertion of their own privacy interest. Therefore, they must rely on their "emasculation" argument to outweigh the need for disclosure. It is important to note what the NCAA does not argue. It does not assert, nor could it, that their association would collapse if disclosure is required. By their own admission they are "the only act in town" in their area of intercollegiate athletics. Thus, they cannot argue that some competitor will be advantaged by disclosure. Further, only one facet of their organization, albeit an important facet, would suffer their grim prophesies of "emasculation."

The Court is of the opinion that these possible effects are clearly outweighed by the public's right to information concerning organizations or associations which receive and expend public monies. This interest is heightened by the nature of the information sought. This Court is of the opinion that the public interest in the affairs of their government and in education are important and fundamental. Further, the interest in disclosure of information from an association whose "fundamental pur-

pose . . . is to maintain "intercollegiate athletes as an integral part of the education program,'" NCAA Brief on Remaining Issues at 5, clearly outweighs the prospective harm disclosure might cause the Association. The Court is of the opinion that any privacy interest the NCAA might assert is clearly outweighed by the interests in disclosure.

2. *Freedom of Association*

In support of its somewhat vague argument that application of the Act infringes upon their constitutional right of association, the NCAA cites *NAACP v. Alabama,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). In *NAACP* the Court allowed the Plaintiff to assert the associational rights of its members, but found no such inherent right in the NAACP itself. *Id.* at 459, 78 S.Ct. at 1170. The Court found that forced disclosure of the NAACP's membership lists furthered the Defendant's racially discriminatory scheme against the Plaintiff. *Id.* at 462, 78 S.C. at 1171-72. In reading this conclusion the Court noted:

> It is important to bear in mind that petitioner asserts no right to absolute immunity from state investigation, and no right to disregard Alabama's laws. As shown by its substantial compliance with the production order, petitioner does not deny Alabama's right to obtain from it such information as the State desires concerning the purposes of the association and *its activities within the State.*

Id. at 463-64, 78 S.Ct. at 1172 (emphasis added).

Under *NAACP v. Alabama,* the NCAA itself has no constitutional right to association. Even assuming that the NCAA has standing to assert the right of its mem-

bers, there is absolutely no evidence or allegation that the Act furthers any sort of discriminatory scheme, or affects the lawful exercise of fundamental civil rights. Moreover, the very language of *NAACP v. Alabama* quoted above, suggests that the constitutional right asserted by the NCAA would not protect it from disclosure of the information sought in this suit. The NCAA has failed to establish how application of the Act would or could deprive the NCAA of any freedom of association.

3. *Academic Freedom*

The NCAA argues that due process protects the educational process and academic freedom and that application of the Act would abridge this important right. Necessarily, the NCAA must claim the right of academic freedom in order to raise this argument, yet does not explain or even argue how this right protects it from disclosure of the information in issue.

Academic freedom has been recognized as a constitutional right implied by the First Amendment and reserved by the Ninth Amendment. *See Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S.Ct. 675, 683-84, 17 L.Ed.2d 629 (1967). Its parameters, however, are "ill-defined and the case law defining it is inconsistent." *Hillis v. Stephen F. Austin State University*, 665 F.2d 547, 553 (5th Cir. 1982). Basically, the right protects the educational process. *See id.; see also Keyishian*, 385 U.S. at 603, 87 S.Ct. at 683-84; *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 388, 9 L.Ed. 2d 405 (1963).

The NCAA has failed to demonstrate or offer any direct authority for the proposition that it is an academic institution of any sort entitled to academic freedom. More-

over, the NCAA has failed to demonstrate how the information sought falls within any constitutionally protected "educational process." The mere fact that the NCAA's members are educational institutions does not confer upon the NCAA the right to assert academic freedom as a constitutional defense in this case. A tangential relation to an academic institution does not confer this constitutional right on the NCAA. *In re Dinnan,* 661 F.2d 426 (5th Cir. 1981), *cert. denied,* 457 U.S. 1106, 102 S.Ct. 2904, 73 L.Ed. 2d 1314 (1982).

In short, the NCAA has totally failed to establish that it may assert a constitutional right to academic freedom.

Accordingly, the Court is of the opinion that the NCAA cannot assert the fundamental rights of association and academic freedom. Further, if the NCAA enjoys some limited constitutional privacy interest it is clearly outweighed by the interest in disclosure of the information sought, i.e., disclosure relates to a legitimate state interest.

III. JOINDER OF ADDITIONAL PARTIES

The NCAA argues for the first time that the member institutions which are the subject of the records sought, claim an interest in those records and may be prejudiced if not joined in this action pursuant to Federal Rule of Civil Procedure 19. The NCAA acknowledges that two members of their organization have been denied intervention in this action. On February 20, 1986 this Court denied the Motion to Intervene of Rice University, and on February 7, 1986, this Court denied the Motion to Intervene of SMU. Because the present Defendants have standing to raise the defenses available to the member universities,

see Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 678 (Tex.1976), the Court found that their interests were already adequately represented by the existing Defendants. *Bush v. Viterna,* 740 F.2d 350, 354 (5th Cir.1984).

Rule 19(a) states:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

FED.R.CIV.P. 19(a). "Under the present rule, pragmatic concerns, especially the effect on the parties and on the litigation, control a court's decision on joinder." *Smith v. State Farm Fire and Casualty Co.,* 633 F.2d 401, 405 (5th Cir.1980); *accord Lone Star Industries v. Redwine,* 757 F.2d 1544, 1551-52 (5th Cir.1985). Further, "[a]n interest in disputed property does not make a party indispensable unless in his absence relief is impossible or the absent person is likely to be prejudiced or his absence will lead to multiple litigation." *Moreau v. Oppenheim,* 663 F.2d 1300, 1310 (5th Cir.1981), *cert. denied,* 458 U.S. 1107, 102 S.Ct. 3486, 73 L.Ed.2d 1368 (1982).

Clearly, complete relief can be accorded among those already parties to this action. The Court's decision re-

garding disclosure of information held by the NCAA and the SWC will not be affected by the absence of any other party. The Court's determination that the member universities are already adequately represented in this action necessitates a finding that they are not so situated that the disposition of this action in their absence will either impair or impede their ability to protect that interest. Moreover, the record is void of any evidence that nonjoinder would leave any of the member universities subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of their claimed interest. FED.R.CIV.P. (19(a). The Court is of the opinion that the NCAA has failed to demonstrate any justification for joinder of additional parties at this time.

IV. ABSTENTION

The NCAA argues that this Court should abstain from ruling in this case "of first impression" because the case presents "unsettled" questions of state law, and because the Court's interpretation of the Act brings the constitutionality of the Act into serious quesion.

Both Defendants removed this case from state court on October 25, 1985. The NCAA moved to dismiss this action for failure to state a claim on October 30, 1985; the motion was denied on November 11, 1985. Thereafter, the parties engaged in extensive and expedited pre-trial discovery, filed numerous motions and participated in a pre-trial conference with the Court. On motion of the NCAA the Court bifurcated this action to determine, in the first instance, whether the Defendants were subject to the Act, whether the information sought was "public

information," and for trial of those Plaintiffs' civil rights claim. The trial was held on March 6 and 7, 1986. Upon inquiry by the Court both Defendants conceded that this Court had pendent jurisdiction to determine the state law claims. In fact, Defendant SWC expressed overwhelming confidence in the Court's ability to determine these now "complex and novel" issues. The Court entered its Memorandum Opinion and Order which determined these issues on May 15, 1986—and now, after almost nine months of litigation, the NCAA argues that the Court should abstain, apparently pursuant to *Railroad Commission v. Pullman,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

Abstention is an extraordinary and narrow doctrine to be used in rare circumstances. *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976). In order to abstain under *Pullman,* "a federal court must find that the case presents a difficult, obscure, or unsettled issue of state law, the resolution of which could eliminate or substantially narrow the scope of the federal constitutional issue." *Nissan Motor Corp. v. Harding,* 739 F.2d 1005, 1009 (5th Cir.1984). Merely because the state courts have not interpreted a statute is not determinative; if the state law in question is clear the federal court should exercise its jurisdiction. *Harman v. Forssenius,* 380 U.S. 528, 534-35, 85 S.Ct. 1177, 1181-82, 14 L.Ed.2d 50 (1965).

First, the Court is of the view that this motion is untimely. Second, the Court is of the view that while this cause may be one of first impression, it does not present issues of state law which are so difficult, obscure or unsettled as to require abstention. Finally, the Court retained jurisdiction over the state claims partially at the behest of

the Defendants who removed the action to this Court. Under *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), the Court properly asserted jurisdiction over the pendent state claims because the federal claim was of sufficient substance to confer subject matter jurisdiction on this Court, and the state and federal claims clearly arose from a common nucleus of operative facts. *Id.* at 725. The state law claims have been fully litigated and are properly before this Court. In such cases

> [p]rinciples of judicial economy, convenience, and fairness to the litigants suggest that a court should be reluctant to dismiss a pendent claim once substantial time and resources have been devoted to such claims and the court has heard the evidence and arguments on such issues. [G]iven the advantages of economy and convenience and no unfairness to litigants, Gibbs contemplates adjudication of these claims.' *Brown v. Knox,* 547 F.2d 900, 903 (5th Cir.1977), *quoting Hagans v. Lavine,* 415 U.S. 528, 545 [94 S.Ct. 1372, 1383, 39 L.Ed.2d 577] (1974).

Caserta v. Village of Dickinson, 672 F.2d 431, 433 (5th Cir.1982). This case is properly before this Court; the Defendants abstention argument, presented belatedly and with clear vision of hindsight, is meritless.

V. PLAINTIFFS' SATISFACTION OF PROCEDURAL PREREQUISITES

The NCAA contends that Intervenors A.H. Belo Corp., and David Eden and The Times Herald Printing Co. failed to request from the NCAA the information they seek before intervening in this suit. The NCAA concedes that Plaintiffs Kneeland and Belo Broadcasting Corp. complied with these procedural prerequisites. Further, the NCAA argues that it should now be given an opportunity

to request an Attorney General's opinion pursuant to section 7.

Section 4 of the Act requires that an individual make application to inspect records at the offices of the custodian of records. TEX.REV.CIV.STAT.ANN. art. 6252-17a, § 4 (Vernon Supp.1986). If the governmental body receives a request for information it believes to be exempt from disclosure, it may request an opinion of the Attorney General as to application of specific exemptions. *Id.* § 7. The governmental body must request the Attorney General's opinion within ten days of the application for inspection. If the governmental body refuses to seek an Attorney General's opinion, or to supply the requested information, the applicant may seek a writ of mandamus compelling disclosure.

The record reflects that Intervenor A.H. Belo Corp. intervened in the state action against the SWC only, on October 14, 1985. On November 8, 1985 A.H. Belo Corp. made a written request of the NCAA. On November 20, 1985, A.H. Belo Corp. amended its complaint to seek a mandamus against the NCAA. The amended complaint was filed more than ten days after A.H. Belo Corp. made its request of the NCAA; therefore, A.H. Belo Corp. complied with the procedural prerequisites of the Act.

The Times Herald Printing Co. and David Eden intervened in the state action on October 17, 1985. These intervenors requested specific information from the NCAA on October 14, 1985. The Times Herald argues that it was not granted permission to intervene in the state proceedings until October 25, 1985, more than ten days after their written request. Under the Texas Rules of Civil Proced-

ure any party may intervene in an action subject to being stricken by the Court upon motion. TEX.R.CIV.P. 60. Thus, it appears that The Times Herald became a party in the state action on October 17, 1986. This conclusion, however, does not compel a finding that The Times Herald has failed to satisfy the necessary procedural prerequisites to their action. Section 7(a) of the Act provides that upon receipt of a request under the Act "the governmental body within a reasonable time, no later than ten days" must request an Attorney General's opinion. TEX.REV.CIV. STAT.ANN. art. 6252-17a, § 7. If the governmental body refuses to request an opinion, to supply the information requested, or to release information declared public by the Attorney General, the person requesting the information may seek a writ of mandamus compelling disclosure. *Id.* § 8. The Act states that the governmental body shall seek an Attorney General's opinion within a reasonable time; it does not necessarily require that the governmental body have ten days to seek an opinion. *Id.*, § 7. Even if The Times Herald sought mandamus only three days after making its request, the Court is of the opinion that the NCAA had a reasonable amount of time to seek an Attorney General's opinion in light of the circumstances of this case. The record reflects that Plaintiff Kneeland made her request of the NCAA four months prior to seeking mandamus; the NCAA never sought an Attorney General's opinion during that period. Intervenor A.H. Belo Corp. waited in excess of ten days after its request was made before seeking mandamus; again, the NCAA made no attempt to obtain an Attorney General's opinion. All of the requests sought substantially similar information. Under these facts it is clear that the NCAA never intended to

request an Attorney General's opinion. In fact, it has been the NCAA's position that they need not seek such an opinion. The Court, therefore, is of the opinion that the NCAA was allowed a reasonable time in which to seek an Attorney General's opinion before Intervenor Times Herald joined the state action.

The NCAA's assertion that it should now be allowed to seek an Attorney General's opinion as to whether they are a governmental body is equally meritless. Section 8 states that if a governmental body refuses to request an Attorney General's opinion, or to provide the information requested, the party who made the request may seek a writ of mandamus. The record clearly establishes that this scenario occcurred and that the Plaintiffs and Intervenors properly sought a writ of mandamus pursuant to section 8. It would strain reason and be an unseemly waste of time, effort and resources of all of the parties to allow the NCAA to now seek an Attorney General's opinion.

Acccordingly, the Court is of the view that the Plaintiff and the Intervenors have met the necessary statutory prerequisites to filing this action, and that the NCAA is not entitled to seek an Attorney General's opinion at this late date.

VI. VALIDITY OF THE ACT UNDER ARTICLE II AND V OF THE TEXAS CONSTITUTION

Both Defendants allege without argument or authority that the Act violates article II of the Texas Constitution in that it "purports to bestow judicial powers and authority upon the Attorney general who is a member of

the executive branch of Government," as well as article V, section I of the Texas Constitution in that it "purports to bestow judicial powers and authority in an entity other than one of the Courts specified in the Texas Constitution." Apparently, both purported violations arise from section 7's requirement that the Attorney General render decisions concerning application of the exceptions set out in section 3 of the Act.

The Court must presume the constitutionality of an act of the legislature. *Texas Public Building Authority v. Mattox,* 686 S.W.2d 924, 927 (Tex.1985); *Smith v. Davis,* 426 S.W.2d 827, 831 (Tex.1968). Therefore, the burden is on the party attacking the statute as unconstitutional. *Texas Public Building Authority,* 686 S.W.2d at 927 (citing *Robinson v. Hill,* 507 S.W.2d 521, 524 (Tex.1974)). The Court will declare a statute unconstitutional only when it it prohibited by a specific provision of the Constitution, "or such is clearly implied." *Id.* at 927. The separation of powers provisions of the Texas Constitution are violated "when the [function] of the judicial process in a field constitutionally committed to the control of the courts is interfered with by the executive or legislative branches. . . ." *State Board of Insurance v. Betts,* 158 Tex. 88, 308 S.W.2d 846, 851-52 (1958) (Norvell, J.); *accord Coates v. Windham,* 613 S.W.2d 572, 576 (Tex.Civ. App.—Austin 1981, no writ).

Section 7 of the Act provides that upon request of a governmental body, the Attorney General shall issue an opinion as to whether the information requested must be disclosed. TEX.REV.CIV.STAT.ANN. art. 6252-17a, § 7 (Vernon Supp.1986). Article 4, section 22 of the Texas

Constitution authorizes issuance of such opinions. Section 22 reads, in pertinent part, that the Attorney General "shall . . . give legal advice in writing to the Governor and other executive officers, when requested by them, and perform other such duties as may be required by law." TEX. CONST. art. IV, § 22. The interpretive commentary which follows this provision of the Constitution states: "The Attorney General . . performs two principal functions: 1. the giving of legal advice in the form of opinions to the governor, heads of departments and state institutions, committees of the legislature, and county authorities: . . ." TEX. CONST. art. IV, § 22, interp. commentary (Vernon 1984). Further, article 4399 requires that the Attorney General render written opinions to certain individuals about questions which affect the public interest. TEX. REV.CIV.STAT.ANN. art. 4399 (Vernon Supp.1986). Therefore, the Attorney General is authorized to issue opinions by constitutional and statutory authority. TEX. CONST. art. IV, § 22; *Plainview Independent School District v. Edmonson Wheat Growers, Inc.*, 681 S.W.2d 299, 302 (Tex.App.—Amarillo 1984, writ refd n.r.e.). Opinions of the Attorney General are not conclusive determinations of the law, but rather persuasive opinions. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex.App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316 (Tex.Civ.App.—Houston [1st Dist.] 1984(no writ). The Attorney General has no authority to enforce his opinions; they are merely advisory. *See Guerra v. McClellan*, 250 S.W.2d 241, 243 (Tex.Civ.App.—San Antonio 1952), *aff'd*, 152 Tex. 373, 258 S.W.2d 72 (1953). This fact was obviously recognized by the legislature when it provided that a governmental

body which refused to comply with an Attorney General's opinion would be subject to a writ of mandamus. TEX. REV.CIV.STAT.ANN. art. 6252-17a, § 8 (Vernon Supp. 1986).

The opinions of Texas Courts are obviously binding and enforceable, TEX. CONST. art. V, § 1, however, they may not issue advisory opinions. *Id.* art. II, § 1; *Employees Retirement System v. McDonald,* 551 S.W.2d 534,536 (Tex. Civ.App.—Austin 1977, writ ref'd). The Act requires that the Attorney General issue advisory opinions which are authorized by constitutional and statutory authority. The Texas judiciary is precluded from issuing such opinions. The Act does not grant judicial authority to the Attorney General, and therefore, does not violate article II or article V of the Texas Constitution.

VII. OTHER DEFENSES

The NCAA's answers contain the following defenses which have not been addressed in this order or the Court's May 15, 1986 Memorandum Opinion: waiver; preemption; abrogation of the contracts and privileges and immunities clauses of the United States Constitution; the privilege of self-critical analysis; and, violations of the clean hands and good faith doctrines. None of these defenses have been extensively briefed or argued. There is absolutely no evidence that the Plaintiffs or Intervenors waived any rights they have under the Act. Likewise, there is no evidence which supports the NCAA's claim that the Act is preempted by some unspecified federal statute, or that application of the Act will interfere with their constitutional right to contract or abridge their rights under the

privileges and immunities clause. Therefore, the Court is of the opinion that these defenses will not bar application of the Act.

Because this action seeks mandamus, an equitable remedy, the NCAA alleges that the Plaintiffs and Intervenors have not acted in "good will" and do not have "clean hands." *Industrial Foundation,* 540 S.W.2d at 674. In Open Records Act cases, however, these equitable defenses are given no weight because "[t]he legislative intent of making public information available to *any person* would be thwarted if a court were allowed to consider the requestor's motives even though the custodian may not do so." *Id.* at 674 n. 5. These defenses are not applicable to this action.

Finally, the NCAA asserts a privilege of self-critical analysis as a bar to application of the Act. This privilege protects against disclosure of records generated as a result of internal investigation. *See Bredice v. Doctors Hospital, Inc.,* 50 F.R.D. 249 (D.D.C.1970), *aff'd,* 479 F.2d 920 (D.C.Cir.1973); Note, *The Privilege of Self-Critical Analysis,* 96 HARV.L.REV. 1083 (1983). The NCAA suggests that the privilege shields disclosure when the information results from a critical self-analysis undertaken by the party seeking protection, the public has a strong interest in preserving the free flow of the information sought, and discovery of the information would curtail its flow. NCAA Brief in Support of Exceptions at 20. The NCAA has offered no authority from this circuit which specifically recognizes this privilege. *In re LTV Securities Litigation,* 89 F.R.D. 595, 614-18 (N.D.Tex.1981), is cited as support for recognition of the privilege; however, that

case is squarely grounded upon an analysis of the attorney-client and work product privileges. Moreover, even if the Court were persuaded that such an amorphous privilege existed in this Circuit and that it might apply to bar application of the Act, the NCAA has not established the criteria it cites for application of the privilege. In this case the "self-critical analysis" was done by the schools themselves or was a product of the NCAA investigating the schools. It was not a product of the NCAA investigating itself. Further, the Court would find it difficult to declare that the public had an interest in maintaining the confidential flow of this information. The Court is of the view that the privilege of "self-critical analysis," if any, is not a constitutional bar to disclosure of this information.

VIII. CONCLUSION

Accordingly, the Court is of the opinion that the Defendants have failed to establish any defense which will bar disclosure of the information sought. The Court expresses no opinion as to the exceptions claimed by the Defendants under the Act, but will issue a separate opinion on those claims.

Carole KNEELAND, Belo Broadcasting Corporation, the Times Herald Printing Company, David Eden and A.H. Belo Corporation d/b/a Belo Corporation News

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION and Southwest Athletic Conference.

Civ. No. A-85-CA-616.

United States District Court,
W.D. Texas,
Austin Division.

Nov. 4, 1986.

Newspapers and others sought disclosure of NCAA and SWC file information regarding recruiting violations, and the District Court, Nowlin, J., held that: (1) deletion of names of students, student athletes, prospective student athletes, and family members was required prior to disclosure of information; (2) public had legitimate interest in information which outweighed privacy interests of others; and (3) NCAA and SWC were not educational institutions for purpose of Buckley Amendment exemption from disclosure of student records.

Ordered accordingly.

See also 650 F.Supp. 1047 and 650 F.Supp. 1064.

Robert M. Roller, Graves, Dougherty, Hearon & Moody, Austin, Tex., for defendant National Collegiate Athletic Assn.

Robert F. Middleton, Baker, Smith & Mills, Dallas, Tex., for defendant Southwest Athletic Conference.

Jack Balagia, Jr., James R. Raup, McGinnis, Lochridge & Kilgore, Austin, Tex., for plaintiffs Carole Kneeland and Belo Broadcasting Corp.

William D. Sims, Paul C. Watler, Jenkens & Gilchrist, Dallas, Tex., for plaintiff-intervenor A.H. Belo Corp., d/b/a The Dallas Morning News.

Frank C. Vecella, Charles L. Babcock, Michael Knapek, Jackson, Walker, Winstead, Cantwell & Miller, Dallas, Tex., for plaintiffs-intervenors The Times Herald Printing Co. and David Eden.

MEMORANDUM OPINION AND ORDER

NOWLIN, District Judge.

I. BACKGROUND

On May 15, 1986, 650 F.Supp. 1047 this Court entered a Memorandum Opinion and Order which determined, among other things, that the Defendants in this action were governmental bodies for purposes of the Texas Open Records Act (the Act), and that the information sought by Plaintiffs and Intervenors is public information. Thereafter, the Defendants produced the information sought for an *in camera* inspection and claimed that virtually all of the information is exempt from disclosure under the exceptions set forth in section 3(a) of the Act. On July 24, 1986, the remaining issues and defenses were tried to the Court. In a Memorandum Opinion and Order filed on August 18, 1986, 650 F.Supp. 1064, the Court overruled the defenses asserted by Defendants. The final task

before the Court is to determine whether any of the exceptions asserted by the Defendants preclude disclosure of the information sought by Plaintiffs and Intervenors.

II. THE BURDEN

In making this final determination, the Court must first inquire into what burden is necessary to establish an exception, and upon whom that burden rests. The key to such inquiry in this case lies in an analysis of section 7 of the Act which recites:

> (a) If a governmental body receives a written request for information which it considers within one of the exceptions stated in Section 3 of this Act, but there has been no previous determination that it falls within one of the exceptions, the governmental body within a reasonable time, no later than ten days, after receiving a written request must request a decision from the attorney general to determine whether the information is within that exception. If a decision is not so requested, the information shall be presumed to be public information.
>
> (b) The attorney general shall forthwith render a decision, consistent with standards of due process, to determine whether the requested information is a public record or within one of the above stated exceptions. The specific information requested shall be supplied to the attorney general but shall not be disclosed until a final determination has been made. The attorney general shall issue a written opinion based upon the deterimnation made on the request.

TEX.REV.CIV.STAT.ANN. art. 6252-17a, § 7 (Vernon Supp.1986). Plaintiffs and Intervenors argue that because the Defendants failed to seek an attorney general's opinion the presumption set out in section 7(a) is applicable.

Defendant SWC points out that section 7 provides no specific direction to an entity which contests its status as a governmental body, and therefore argues that the presumption is inapplicable. Defendant NCAA takes no firm position on application of the section 7 presumption, but rather argues that any presumption created is rebuttable and not conclusive.

Resolution of this issue is, at best, difficult. Indeed, the Act provides no specific direction to an organization which contests its status as a governmental body. The SWC's argument that it is unjust to apply the presumption to an organization that "has an honest and good faith belief that it is not subject to TORA," is at first blush somewhat appealing. Further analysis, however, diminishes the argument.

The Legislature obviously intended that the attorney general initially decide whether information sought from a governmental body falls within an exception to disclosure. Section 7 does not allow a requestor to seek an attorney general's opinion. *Id.* § 7. If the governmental body refuses to request an attorney general's opinion the information is presumed to be public and the requestor may seek a writ of mandamus which compels disclosure if the information is not released. *Id.* §§ 7(a), 8. The Legislature obviously placed the presumption in the Act as a means of forcing governmental bodies to seek the opinion of the state attorney general.

Adoption of the SWC's argument could effectively eliminate the role of the attorney general in the Act. Under their argument any organization could assert an "honest" belief that it is not a governmental body under the Act,

refuse to request an attorney general's opinion and force the requestor to seek mandamus in district court without benefit of the presumption. The SWC has cited no authority which supports its argument nor has any authority been found by the Court. A careful review of Attorney General Opinions and Open Records Decisions demonstrates that from the inception of the Act, the attorney general has determined whether entities or organizations are governmental bodies. *E.g.*, OP. TEX. ATT'Y GEN. NOS. H-554 (1975), H-450 (1974); ORD-228 (1979), ORD-1 (1973). It is clear from reading Attorney General Opinions and Open Records Decisions that the threshold issue the attorney general must determine is whether the body from whom information is sought is a governmental body. Both logic and precedent dictate that the attorney general is authorized to make this determination. Further, there is no authority for the proposition that the attorney general is not authorized to make this determination. Thus, when an organization contests its status as a governmental body and refuses to seek an Attorney General Opinion, a later determination at a mandamus action brought pursuant to section 8 that the organization is a governmental body raises the presumption that the information sought is public.[1]

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1. In light of the authority cited in the Court's opinion of May 15, 1986, it is at least curious that the SWC would argue that it had a "honest and good faith belief" that it was not a governmental body under the Act. The Court is of the opinion that the SWC falls squarely within the definition of governmental body and that the applicable authority supports that determination. The Court makes no comment on whether the NCAA had an "honest and good faith belief" that they were not a governmental body as the NCAA does not argue application of the presumption, but rather the effect of the presumption.

Intervenor Times Herald Printing Company argues that the Legislature intended the presumption of Section 7(a) to be conclusive. The applicable authorities do not support this proposition. Texas courts have consistently allowed a governmental body which failed to make a proper section 7(a) request the opportunity to rebut the presumption. *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 324 (Tex.App.—Houston [1st Dist.] 1984, no writ); *Hutchins v. Texas Rehabilitation Comm'n*, 544 S.W.2d 802, 803 (Tex. Civ.App.—Austin 1976, no writ). Open Records Decision 139 clearly sets out the burden necessary to overcome the presumption: "[T]his presumption could be overcome by a compelling demonstration that the requested information should not be made public." TEX. ATT'Y GEN. ORD-319 (1982); *e.g.*, TEX. ATT'Y GEN. ORD-26 (1974). Accordingly, the information sought is presumed to be public information; the presumption may be overcome by the Defendants only by a compelling demonstration that the information sought by Plaintiffs and Intervenors should not be released.

III. EXEMPTIONS

Pursuant to the Court's Order of May 15, 1986, Defendants filed a list of exceptions that, they argue, apply to the subject documents. The Defendants assert no exception is applicable to certain documents. The Court hereby Orders that those documents be disclosed. Further, the SWC asserts that several documents relate to on-going investigations. The records submitted by the NCAA apparently relate to completed investigations. Only that in-

formation which relates to completed investigations is public and must be disclosed. *See* TEX.REV.CIV.STAT. ANN. art. 6252-17a, § (1) (Vernon Supp.1986).

Defendant NCAA argues that virtually every document falls within one of the following exceptions: 3(a)(1), information deemed confidential by law, within constitutional, statutory, or by judicial decision; 3(a)(11), interagency or intra-agency memorandums or letter which would not be available by law to a party other than one in litigation with the agency; 3(a)(14), student records at educational institutions; and education records exempt from disclosure under section 14(e). Likewise, Defendant SWC argues that the vast majority of the documents submitted for *in camera* inspection fall within the following exceptions: 3(a)(1); 3(a)(8), records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime; 3(a(11); and section 14(e).

The Defendants, as custodians of the information sought by Plaintiffs and Intervenors may assert any of the exceptions necessary to protect their interests as well as those of third parties not associated with them. *Industrial Foundation of the South v. Texas Industrial Accident Board,* 540 S.W.2d 668, 678 (Tex.1976), *cert. denied,* 430 U.S. 931, 97 S.Ct. 1550, 51 L.Ed.2d 774 (1977); *Hubert v. Harte-Hanks Texas Newspapers, Inc.,* 652 S.W.2d 546, 548 (Tex.App.—Austin 1983, writ ref'd n.r.e.). The Court will discuss the applicability of each exception asserted, and then specifically rule on the applicability of the exceptions asserted.

A) *Section 3(a)(1); Confidential Information*

Section 3(a)(1); exempts from disclosure "information deemed confidential by law, either Constitutional, statutory or by judicial decision." TEX.REV.CIV.STAT. ANN. art. 6252-17a, § 3(a)(1) (Vernon Supp.1986). The NCAA asserts that it is entitled to withhold disclosure of the documents sought based upon the federal constitutional right to privacy. Both Defendants argue that the information sought is protected by the state common law right to privacy.

1) *Constitutional Right to Privacy*

The NCAA first argues that the information given them by various individuals was conveyed under a pledge of confidentiality and is therefore entitled to constitutional protection. This is clearly a factor to be considered when the Court balances the interests of Plaintiffs, Intervenors and Defendants, but it is not by any means a conclusive factor. *See Robles v. Environmental Protection Agency,* 484 F.2d 843 (4th Cir.1973)(FOIA case); *Fadjo,* 633 F.2d at 1176. Such promises may likewise be considered under Texas law. Promises of confidentiality will not prevent disclosure of information under the Act, unless they are specifically authorized by law. OP. TEX. ATT'Y GEN. H-258 (1974); ORD-554 (1975).

Next, the NCAA argues that because the information contains private embarassing facts it deserves constitutional protection. The United States Constitution prohibits governmental intrusion into an individual's private affairs. *See Whalen v. Roe,* 429 U.S. 589, 598-602, 97 S.Ct. 869, 875-877, 51 L.Ed.2d 64 (1977); *Paul v. Davis,* 424 U.S.

693, 713, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405 (1976); *Ramie v. City of Hedwig Village,* 765 F.2d 490, 492 (5th Cir. 1985); *Fadjo v. Coon,* 633 F.2d 1172, 1175-77 (5th Cir. 1981). The right to privacy consists of two interrelated strands: the individual's right to avoid disclosure of personal matters, and the individual's interest in independence in making certain important decisions. *Fadjo,* 633 F.2d at 1175 (*quoting Whalen,* 429 U.S. at 599-600, 97 S.Ct. at 876-877). "Both strands may be understood as aspects of the protection which the privacy right affords to individual autonomy and identity. [The disclosural] strand, however, described by this circuit as "the right to confidentiality,' is broader in some respects." *Fadjo,* 633 F.2d at 1175 (citations omitted). The decision-making strand of the privacy right is narrow and concerns matters such as marriage, procreation, contraception, family relationships, and child rearing and education." *Whalen,* 429 U.S. at 600, n. 26, 97 S.Ct. at 877, n. 26 (*quoting Paul,* 424 U.S. at 713); *e.g., Bowers v. Hardwick,* — U.S. —, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986). The disclosural strand is broader and includes matters which fall outside the decision-making strand, yet implicate the individual's interest in nondisclosure. *See e.g., Nixon v. Administration of General Services,* 433 U.S. 425, 455, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977) (disclosure of personal information and personal finances); *DuPlantier v. United States,* 606 F.2d 654, 669-71 (5th Cir.1979) (financial disclosure within scope of disclosure strand); *Plante v. Gonzalez,* 575 F.2d 1119, 1132 (5th Cir.1978) (financial disclosures). While this strand is broader, the privacy interest [which it protects] is weaker than that found wanting in *Whalen v. Roe. . . .*" *Nixon,* 433 U.S. at 458, 97 S.Ct. at 2797.

The NCAA claims that virtually *all* of the information sought by Plaintiffs and Intervenors contains private facts about third parties, and by extension, private facts about the NCAA which cannot be inquired into or disclosed pursuant to state law absent some legitimate and proper governmental concern. The Court's *in camera* review of the information sought, confirms that it contains large amount of personal and financial information concerning students, student-athletes, university employees, university alumni, as well as other private individuals. The Court must determine whether the invasion of privacy inherent in disclosure of this information outweighs any *legitimate interest* asserted by Plaintiffs and Intervenors through the Act. *Whalen,* 429 U.S. at 492, 97 S.Ct. at 2815; *Fadjo,* 633 F.2d at 1176; *Plante,* 575 F.2d at 1134 (more than mere rationality must be demonstrated). In this regard the NCAA will establish a compelling demonstration'' and meet its burden if it demonstrates that the legitimate public interest is outweighed by the interest they assert. *See* TEX. ATT'Y GEN. ORD-71 (1975).

2) *Legitimate Public Interest v. Interesting Information*

The Plaintiffs and Intervenors characterize the Defendants as organizations that demonstrate an "arrogant attitude" that the public has no legitimate interest in their regulation of intercollegiate recruiting practices. The Defendants characterize Plaintiffs and Intervenors as a sensationalistic and unscrupulous press interested only in "selling newspapers" with nc real concern about the best interest of the public or intercollegiate athletics. They allege Plaintiffs seek only information which the public

finds curious or interesting, not information which must be disclosed because of a legitimate public interest or concern. Somewhere between these polarized views lies the real intent of each party; an intent which this Court cannot and will not devine; first, because it is not particularly relevant to these proceedings, and second, because it is most likely impossible to conclusively determine. The fact that there now exists a "nationwide scandal" engulfing intercollegiate recruiting practices, and that the public has a legitimate, indeed compelling, interest in that controversy need not be devined; both are readily apparent.

The nationwide concern over intercollegiate athletics extends well beyond scandals in recruiting. The public controversy and concern essentially involves the proper role of athletics at our universities and in the adequate education of our nation's young people. The Court is of the firm belief that education is the cornerstone upon which the future of this country rests. The public can have no more legitimate concern than a concern for the proper education of its young people. The actions of an organization or association whose "fundamental purpose . . . is to maintain intercollegiate athletics as an integral part of the education program," NCAA Brief on Remaining Issues at 5, necessarily affects education and the educational process. The public, then, necessarily has some interest in the activities of that organization. When that organization is "the only act in town" ultimately responsible for enforcement of rules and imposition of sanctions against public and private educational institutions, the public interest in the activities of that organization increases almost exponentially. There is no question that the public has

a legitimate and vital concern about education, the role of athletics in education, and specifically the nationwide scandal involving recruiting violations.[2]

The record contains substantial evidence to support this Court's determination that recruiting violations are matters of substantial public concern. Congress has investigated recruiting violations. Indeed members of the NCAA Enforcement Committee have been called before Congress to testify about enforcement proceedings. *NCAA Enforcement Program: Hearings Before the Subcommittee on Oversight and Investigation of the House Committee on Interstate and Foreign Commerce,* 95th Cong., 2d Sess. (1978). This Court has taken notice of numerous articles and publications which address the subject. *E.g.,* Gaona, *The National Collegiate Athletic Association: Fundamental Fairness and the Enforcement Program,* 23 ARIZ.L.REV. 167 (1983); Remington, *NCAA Enforcement Procedures Including the Role of the Committee on Infractions,* 10 J.C. & UNIV.LAW 181 (1983); Comment, *Compensation for Collegiate Athletes: A Run for More than the Roses,* 22 SAN DIEGO LAW REV. 701 (1985); J. Michener, *Sports in America* 183-333 (1976).

Moreover, the controversy has been recognized by at least one other court. *Barry v. Time, Inc.,* 584 F.Supp. 1110

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2. One need go no farther than the State of Texas to find an example of the public's concern about education and the role of athletics in education. Recently, the role of athletics and other extra-curricular activities became paramount to the basic educational needs of our children. The public concern and outcry became so great that the Texas Legislature responded by enacting the so-called "no pass, no play rule." TEX.EDUC. CODE ANN. § 21.920 (Vernon 1984).

(N.D.Ca.1984). In that suit, Plaintiff brought a libel action against Time, Inc. Under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Court was required to determine whether the controversy in issue was a "public controversy." *Id.* at 1115. The Court found that the concern over the role of athletics in our universities was not simply a matter of interest to the public, but rather was a "real dispute, the outcome of which affects the general public or some segment of it in an appreciable way." *Barry*, 584 F.Supp. at 1116-17 (*quoting Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C.Cir.), *cert. denied*, 449 U.S. 898, 101 S.Ct. 266, 66 L.Ed.2d 128 (1980). As Judge Patel aptly stated:

> Furthermore, this controversy must be viewed in the context of the larger public debate over the proper role of athletic programs at institutions of higher learning. For many years, critics of bigtime collegiate athletics have commented on what they perceived to be the incongruity of a "win at all costs" attitude, and the concomitant infractions of NCAA rules such an attitude engenders at educational institutions, which are at the same time attempting to instill some sense of civic virtue in their students. Conversely, supporters of major collegiate athletic programs have noted that such programs provide an opportunity for student-athletes to obtain an education which might otherwise be unavailable to them, while at the same time boosting school morale and providing needed revenues.

Id. at 1116-17 (footnote omitted).

Against these public concerns, the Court must weigh the privacy interest of the NCAA and the individuals from or about whom information was collected by the NCAA.

The Court has already determined that the NCAA's privacy interest, to the extent that it exists, does not outweigh the public interest and the need for disclosure in this case. *Kneeland et al. v. NCAA*, 650 F.Supp. 1064, 1068-69 (W.D.Tex.1986). The Court must next determine whether the privacy interests of certain individuals, as asserted by the NCAA, outweigh the public interest and prevent disclosure. The documents submitted for *in camera* inspection contain financial information, allegations of misconduct and responses thereto as well as other information which would doubtless be characterized as private, intimate or embarrassing by the individuals who are the subject of the information. Basically, the information concerns four (4) groups of individuals; students and their families; coaches, staff and university employees; alumni or "boosters;" and sources of information or "informers." In balancing the interests of all parties the best resolution to this dispute requires a judgment which protects the privacy interests asserted and satisfies the legitimate interests of the public in disclosure of the information as asserted by the Plaintiffs and Intervenors through the Act. *See Industrial Foundation*, 504 S.W.2d at 686.

The information submitted for *in camera* inspection contains voluminous personal, financial and biographical data about prospective student-athletes, student-athletes, and their families. The vast majority of the student-athletes or prospective student-athletes named in the NCAA investigation files are persons who were the subjects of recruiting violations, not the perpetrators of violations nor individuals who sought improper recruitment incentives. The Plaintiffs and Intervenors do not state any

legitimate interest in discovering the identities of these persons much less their personal, financial, or biographical data. Disclosure of improper activity or recruiting practices, on the other hand, will necessarily aid the general public, parents, athletes, coaches, teachers, counselors, recruiters, alumni and boosters in understanding specific violations and preventing violations and illegal practices before they are consummated. The Court can perceive no legitimate public interest in disclosure of the identity or personal data of students or their families. Consequently, the Court will Order that the names of all students, student-athletes, prospective student-athletes, as well as the names of their family members, be redacted from the information ordered disclosed by this Court. In addition, all transcripts, phone numbers, bank account numbers, social security numbers, student numbers, geographical and biographical data which tend to identify any student, student-athlete, prospective student-athlete or any member of their family shall be redacted from the information ordered disclosed by this Court. The Court would note that it is sorely tempted to order the release of the names of those students who solicited improper recruitment and especially the names of parents and family members who solicited improper recruitment. Those who seek to purposefully profit from a corrupt system are themselves corrupt and their actions are despicable. It is especially disheartening to read of parents who use their children's skills solely for the parents' economic gain and at great and lasting cost to their children. The Court, however, is of the opinion that exposure of these pathetic activities would only cause greater harm to those the Court, and presumably all parties, seek to protect—the student athlete .

The public's legitimate interest in the information about the other specified group members' involvement in recruiting violations is much more apparent. High school and college coaches, staff members and employees aften have the most direct contact with student athletes, prospective student-athletes, recruiters and parents. They often have the best overall picture of the recruiting process. Generally, they are either the parties who commit recruiting violations or the first to be aware that violations have occurred. Likewise, alumni and "boosters" are often the first to know about recruiting violations; especially when they offer improper incentives. Informers or others who provide information about recruiting violations obviously have some first-hand knowledge of recruiting violations. Often these individuals initiate the investigative process.

Some of the information collected by the NCAA contains intimate, personal or financial information about these individuals. Their limited disclosural privacy right does not outweigh the public's legitimate interest in the information sought by Plaintiffs and Intervenors. The public has a legitimate interest in knowing who recruits illegally, how these unscrupulous individuals operate, which institutions tolerate or encourage such activity, and what, if any, sanctions are imposed upon these individuals or institutions when discovered. Further, student-athletes and recruits as well as their parents have a legitimate interest, if not a great need, for this information. They should be aware of the tactics and techniques of overzealous alumni, boosters, and coaches. They need to know what type of inducements are illegal, and they need to be aware of the sanctions imposed upon violations. Further,

alumni and boosters of all institutions have a legitimate interest in knowing the circumstances of violations as well as the identity of violators. Such public knowledge will facilitate compliance with recruiting rules and discourage similar violations. The limited disclosural privacy rights of the individuals named in the information sought by Plaintiffs and Intervenors, pale in the face of these legitimate public interests. These important interests require disclosure of the information in issue with the exception of the information noted earlier.

3) *State Common Law Privacy*

Both Defendants assert that the information at issue is excepted from disclosure under section 3(a)(1) of the Act because it is protected by Texas common law. Specifically, the Defendants allege that the "private and embarrassing facts" concept as well as the "false light" privacy concept bar disclosure of the information at issue.

The Texas Supreme Court addressed these concepts in *Industrial Foundation of the South v. Texas Industrial Accident Board,* 540 S.W.2d 668, 682 (Tex.1976) (*citing Billings v. Atkinson,* 489 S.W.2d 858 (Tex.1973)). The Court established a two-prong test to determine whether otherwise public information could be deemed confidential under state common law. First, the information must contain "highly intimate or embarrassing facts about a person's private affairs such that its publication would be highly objectionable to a person of ordinary sensibilities." *Id.* at 685. Second, the information must not be of legitimate concern to the public. *Id.* Both requirements must be met before the information will be pro-

tected. *Id.;* TEX. ATT'Y GEN. ORD-423 (1984); ORD-400 (1988); *see Calvert v. Employees Retirement System of Texas,* 648 S.W.2d 418 (Tex.App.—Austin 1983, writ ref'd n.r.e.). The Court noted that once the first prong was established, the burden would fall upon the requestor to establish a legitimate public concern. *Id.* In this case, however, Defendants did not request an attorney general's opinion pursuant to section 7(a). Therefore, this burden shifts to Defendants. TEX.REV.CIV.STAT. ANN. art. 6251-17a, § 7(a) (Vernon Supp.1986); *Houston Chronicle Publishing Co.,* 673 S.W.2d at 324.

The Court has already determined that the public has a legitimate interest in the information sought; consequently, the second prong of the test has not been met, and Texas common law will not prevent disclosure of the information in issue. While a person of ordinary sensibilities might well be embarrassed by a revelation that they engaged in some sort of recruiting prohibited by the Defendants, his or her embarrassment cannot prevent disclosure of information in which the public has a legitimate public interest.

Both Defendants argue that ORD-142 requires that the information sought be protected. TEX. ATT'Y GEN. ORD-142 (1976). The Court is not convinced that ORD-142 mandates the result sought by Defendants. The requestor in ORD-142 sought disclosure of SWC minutes. He asserted that the public had an interest in understanding the rationale behind certain actions of SWC representatives from public universities. The Attorney General noted that the SWC minutes contained no details of allegations or investigations and thus could not explain

the reasons for the actions taken. The opinion noted that the individuals reprimanded had a privacy interest in their name and the fact of the reprimand. The Attorney General concluded that the requestor failed to show a public interest in the minutes.

In this case, Plaintiffs and Intervenors have demonstrated a legitimate public interest in the information sought. Moreover, the Attorney general has since determined that an individual's name, the fact that they were disciplined, the punishment assessed and the facts which led to the discipline are not private under section 3(a)(2) of the Act. TEX. ATT'Y GEN. ORD-315 (1982). While this exception is not involved in this case, the privacy standard or analysis involved is the same as that employed for a section 3(a)(1) analysis. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546 (Tex.App.—Austin 1983, writ ref'd n.r.e.). The Court is of the opinion that the second prong of the *Industrial Accident Board* test has not been satisfied; therefore, that aspect of state common law privacy will not bar disclosure of the information in issue.

The "false light" privacy concept was recognized in *Industrial Accident Board*, 540 S.W.2d at 682, and applied by the Attorney General in ORD-308. TEX. ATT'Y GEN. ORD-308 (1982). There, the Attorney General held that portions of an investigative report would place an individual under investigation in a false light. Those portions were presumed false because:

> 1) the information [was] communicated to a public body by an anonymous source; 2) the agency made a determination that the information [was] not in fact

> true; and, 3) the public interest in disclosure was minimal.

Id. The Attorney General subsequently held:

> A governmental body may withhold information on the basis of false light privacy only if it finds, based upon the weight of the evidence *demonstrable* to this office, that there are serious doubts about the truth of the information. In addition, the information must be highly offensive to a reasonable person and the public interest in disclosure must be minimal.

TEX. ATT'Y GEN. ORD-372 (1983) (emphasis added). "This is not a balancing test; the information must satisfy *both* of these tests [highly offensive and of minimal public interest] to be held non-disclosable." *Id.* ORD-400 (1983).

The Court has already determined that the public has a legitimate interest in the information at issue. Further, a majority of the information communicated to the defendants did not come from an anonymous source. The information which did come from an anonymous source is not specifically identified by Defendants. Moreover, the Defendants have failed to point out the demonstrable evidence which establishes serious doubt about the truth of any particular piece of information. The Act requires that the governmental body "determine which specific exception applies to particular information. Open Records Decision No. 150 (1977). A general claim that an exception applies to an entire report, when that exception is clearly not applicable to all of the information in the report, does not comport with the procedural requirements of the Act." *Id.* ORD-419 (1984). Both the Act and this

Court's May 15, 1986 Order require that Defendants specify the exemption claimed for each piece of information. Specificity is lacking with regard to this claimed exemption. The Court is of the opinion that the "false light" privacy concept will not bar disclosure of the information at issue.

Both Defendants claim that the common law informer's privilege bars disclosure of the information sought.

> The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

Rovario v. United States, 353 U.S. 53, 59, 77 S.Ct. 623, 627, 1 L.Ed.2d 639 (1957). The privilege has been extended to those who provide information to "administrative officials having a duty of inspection or law enforcement within their particular spheres." *E.g.,* TEX. ATT'Y GEN. ORD-285 (1981) (police department investigation); ORD-279 (1981) (zoning ordinance enforcement with criminal penalties); ORD-230 (1979) (school district investigation of alleged employee criminal conduct). The privilege has been extended only to agencies which exercise some police power. Neither Defendant has a duty of inspection nor a duty of law enforcement. In short, they are not authorized to exercise any form of police power. Therefore, the informer's privilege will not bar disclosure of the information at issue.

4) *Freedom of Association*

The NCAA argues that any disclosure mandated by the Act "would violate the member school's and student's constitutional right of freedom of association." The NCAA cites *NAACP v. Alabama,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) in support of its argument that disclosure will infringe upon its member school's right to "engage in association for the advancement of beliefs and ideas." *Id.* at 460, 78 S.Ct. at 1170.

The Court previously rejected the NCAA's claim that the association was protected by the first amendment guarantee of freedom of association. *Kneeland, et al v. NCAA, et al.,* 650 F.Supp. 1064, 1069-70 (W.D.Tex.1986). The Court will assume that the NCAA has standing to assert the associational rights of its members. *See NAACP v. Alabama,* 357 U.S. 449, 458-59, 78 S.Ct. 1163, 1169-70, 2 L.Ed.2d 1488 (1958); *Industrial Foundation,* 540 S.W.2d at 678. The first amendment protects the individual's right to speak freely, advocate ideas, associate with others, and petition the government for redress of grievances. *Smith v. Arkansas State Highway Employers, Local 1315, et al.,* 441 U.S. 463, 464, 99 S.Ct. 1826, 1827, 60 L.Ed.2d 360 (1979). The government cannot impede an association's right to advocacy on behalf of its members by general prohibition or by imposition of sanction for expression of a particular view that it opposes. *Brandenburg v. Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969); *NAACP v. Batton,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). Further, the government cannot require disclosure of membership in an association in an attempt to restrain freedom of association. *NAACP v. Alabama,*

357 U.S. 449, 462, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488 (1958); *Plante v. Gonzales,* 575 F.2d 1119, 1132 (5th Cir. 1978).

Disclosure of the information in issue will not prohibit the NCAA's members from joining together, "or persuading others to do so, or from advocating any particular ideas." *Smith,* 441 U.S. at 465, 99 S.Ct. at 1828. There are no allegations in this case that disclosure under the Act will result in retaliation or discrimination proscribed by the first amendment. The general public is well aware of the NCAA's role in college sports, the nature of the NCAA's membership, and the fact that prospective student-athletes and student athletes may be improperly recruited. Despite these known facts, the NCAA's membership has not waned. It cannot be seriously argued that disclosure of specific details of recruiting violations will adversely affect NCAA membership. This conclusion is supported by the fact that the NCAA currently maintains almost exclusive control over college sports. Any institution that desires to maintain a significant program in major sports must adhere to NCAA rules. "[M]embership in the NCAA is a prerequisite for institutions wishing to sponsor a major, well-rounded athletic program." *Board of Regents v. NCAA,* 546 F.Supp. 1276, 1288 (D.C.Okla.1982), *aff'd,* 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984); Weistant, *Legal Accountability and the NCAA,* 10 J.C. & UNIV. LAW 167, 171-72 (1983).

The NCAA has failed to demonstrate that disclosure required by the Act is motivated by a retaliatory or discriminatory intent or has any retaliatory or discrimina-

tion effect. The member's first amendment right to freedom of association will not be abridged by disclosure of the information in issue.

5) *Attorney-Client Privilege*

The NCAA asserts that some documents are protected from disclosure by the attorney-client privilege. Confidential communications between attorney and client for the purpose of obtaining legal advice are protected by this privilege. *Fisher v. United States,* 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976); *Hodges, Grant & Kaufmann v. United States Government,* 768 F.2d 719, 720-21 (5th Cir.1985). The burden of demonstrating the applicability of the privilege rests upon the NCAA. 768 F.2d at 721. If the NCAA establishes applicability of the privilege it will have established a compelling demonstration that the information should not be disclosed and met the presumption of section 7(a).

The Court has reviewed the documents that are claimed to be exempt under the attorney-client privilege, and is of the opinion that the information contained therein was communicated between attorney and client for the purpose of obtaining legal advice. NCAA document numbers 863, 865, 874, 875, 876 and 1815A fall under the privilege and shall not be disclosed.

6) *Exception for Self-Critical Analysis*

The NCAA alleges that the documents submitted for *in camera* review were generated as the result of their member institutions' cooperation and participation in various NCAA investigations. Much of the information

sought is the product of the member institutions' internal investigation of allegations posed by the NCAA. Consequently, the NCAA argues that the requested information is protected by a privilege of self-critical analysis. The Court previously ruled that the NCAA could not assert the privilege. *Kneeland, et al v. NCAA, et al.,* 650 F.Supp. 1064, 1075 (W.D.Tex. Aug. 18, 1986). Intervenor A.H. Belo Corp. argues further that the NCAA has no standing to assert the privilege, if any, for its member institutions. The Court will assume the NCAA's standing to assert this privilege, if any, on behalf of its member institutions. *See Industrial Foundation,* 540 S.W.2d at 668.

As noted in the Court's prior opinion, the privilege of self-critical analysis protects against disclosure of information generated by internal investigations. *Kneeland,* at 1075. Three criteria must be met before the privilege is effective:

1. The information must result from a critical self-analysis undertaken by the party seeking information;
2. the public must have a strong interest in preserving the free flow of the type of information sought; and
3. the information must be of the type whose flow would be curtailed if discovery were allowed.

Note, *The Privilege of Self-Critical Analysis,* 96 HARV. L.REV. 1083, 1086 (1983); *e.g., Bredice v. Doctors Hospital, Inc.,* 50 F.R.D. 249, 250-51 (D.D.C.1970), *aff'd,* 479 F.2d 920 (D.C.Cir.1973).

The Court has found no authority in this Circuit which recognizes the privilege of self-critical analysis.

Even if the Court assumes the viability of the privilege, the NCAA cannot establish the second criteria set out above. The public may have an interest in preserving the free flow of the information sought, but even more compelling is the public overriding interest in disclosure of the information for the reasons previously outlined. Further, any harm incurred because of disclosure occurred when the member institution disclosed the results of its internal investigation to the NCAA. The purpose of the privilege is to encourage frank internal review. Once the results of an investigation are presented to the NCAA that purpose is vitiated. The privilege of self-critical analysis will not bar disclosure of the information sought by Plaintiffs and Intervenors.

B) *Section 3(a)(8); Law Enforcement Records.*

Defendant SWC asserts that the information in issue is exempt as law enforcement records. This exception has generally been restricted to records of governmental agencies that investigate and enforce criminal laws. *See e.g., Heard v. Houston Post Co.,* 684 S.W.2d 210, 212-13 (Tex.App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Houston Chronicle Publishing Co.,* 673 S.W.2d at 320-21; TEX. ATT'Y GEN. ORD-438 (1986); ORD-434 (1986); ORD-372 (1983). The SWC is not a law enforcement agency. It is not charged with the investigation or enforcement of criminal laws. The only rules it enforces are promulgated by its members. Even if this Court extended this exception to the SWC, it applies only "if the release of information would 'unduly interfere' with law enforcement or prosecution." TEX. ATT'Y GEN. ORD-

438 (1986). "When the "law enforcement' exception is claimed as a basis for excluding information from the public view, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how and why reelase would unduly interfere with law enforcement." ORD-434. Defendant SWC has not demonstrated that prosecution based upon any piece of information it holds is anticipated. Further, Defendant has submitted no evidence which demonstrates that release of any information would unduly interfere with enforcement of criminal laws. Section 3(a)(8), therefore, is inapplicable. ORD-438 (1986).

C) *Section 3(a)(11); Inter-Agency or Intra-Agency Memoranda*

Both Defendants claim that virtually every document produced for *in camera* inspection is an inter-agency or intra-agency memoranda excepted from disclosure by section 3(a)(11). Section 3(a)(11) is designed to protect from disclosure "advice and opinions on policy matters and to encourage open and frank discussion between subordinate and chief concerning administrative action. Attorney General Opinion H-436 (1974); Open Records Decision Nos. 179 (1977); 168 (1977), 163 (1977), 149 (1976), 137 (1976), 128 (1976), 86 (1975), 81 (1975), 29 (1974) and 20 (1974)." TEX. ATT'Y GEN. ORD-196 (1978); *e.g., Austin v. City of San Antonio,* 630 S.W.2d 391, 394 (Tex.App.—San Antonio 1982, writ ref'd n.r.e.); TEX. ATT'Y GEN. ORD-429 (1985); ORD-392 (1983); ORD-308 (1982). When advice, opinions and recommendations appear in the same document with objective factual dates, the factual information should be severed and disclosed.

OP. TEX. ATT'Y GEN. NO. H-436 (1974); *e.g.*, ORD-435 (1986); ORD-429 (1985). If the factual information cannot be reasonably severed from advice, opinion or recommendations, the information will not be disclosed. *See id.* ORD-429 (1985). If the agency adopts or incorporates by reference a memorandum in explaining the basis of a decision, the exception is waived and the information must be made public. TEX. ATT'Y GEN. ORD-137 (1976) (*citing NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975)). In determining what constitutes an opinion, it is important to note the distinction between evaluation and recommendation. ORD-213 (1978). Only recommendations will be excepted.

The vast majority of the documents submitted for *in camera* inspection contain objective factual information. In fact, most of the documents contain only objective factual information. The NCAA has not attempted to assist the Court in separating advice, opinion and recommendation from objective fact. Rather, it claims that entire documents, a significant number of which consist of hundreds of pages, are excepted by this section. The SWC is generally more specific, and claims that certain paragraphs should be exempted. Because the presumption of section 7(a) is in effect, Defendants must establish a compelling demonstration that the information in issue should not be released.

Defendants have met this burden only to the extent that the Court has applied the privacy exceptions under section 3(a)(1). In all other respects the Court has found no compelling demonstration that the information claimed to be exempted under section 3(a)(11) should be excepted

from disclosure. Accordingly, the Court is of the opinion that section 3(a)(11) will not bar disclosure of the information in issue.

D) *Sections 3(a)(14) and 14(e); Student Records*

Both Defendants allege that "almost *all*" of the information in issue consists of student records and therefore cannot be disclosed under sections 3(a)(14) and 14(e) of the Act. Section 3(a)(14) excepts from disclosure "student records at educational institutions funded wholly, or in part, by state revenue; . . ." TEX.REV.CIV.STAT. ANN. art. 6252-17a, § 3(a)(14) (Vernon Supp.1986). Section 14(e) states: "Nothing in this Act shall be construed to require the release of information contained in education records of any educational agency or institution except in conformity with the provisions of the Family Educational Rights and Privacy Act [the Buckley Amendment]. . . ." *Id.*, § 14(e). The Act does not define "educational institution or agency" or "student records." Moreover, the Buckley Amendment clearly states that an education "agency or institution [is] any public or private agency which is the recipient of funds under any applicable program." 20 U.S.C. § 1232g(a)(1)(C), (3) (1982). Further, the Buckley Amendment defines education records as "those records which: 1) are directly related to a student, and 2) are maintained by an educational agency or institution or by a party acting for the agency or institution." *Id.*, § 1232g. "[T]he prohibitions of the Amendment cannot be deemed to extend to information which is derived from a source independent of school records." *Frasca v. Andrews*, 463 F.Supp. 1043, 1050 (S.D.N.Y. 1979). If the Defendants are educational agen-

cies or institutions under either provision of the Act, the information in issue may be disclosed only in accordance with the Buckley Amendment and the Act.

There is no evidence that either Defendant is an educational agency or institution under the Buckley Amendment. Nothing in the record indicates that they receive any federal funds. Moreover, the only Court to address the issue specifically held that an intercollegiate athletic conference was not an educational agency or institution as defined by the Act, and that records held them were not education records. *Arkansas Gazette Co. v. Southern State College, et al.*, 620 S.W.2d 258, 259 (Ark. 1981), *appeal dismissed and cert. denied,* 455 U.S. 931, 102 S.Ct. 1416, 71 L.Ed.2d 640 (1982). The Defendants do not fit the definition of educational agency or institution under the Buckley Amendment. Moreover, the Court is not convinced that the information in issue is "maintained by [Defendants] acting for the agency or institution," i.e., their member universities. The record reflects that the information maintained by the Defendants is not necessarily provided by their member universities; it is often not available to member universities, and, as this case demonstrates, it is often used *against* the member universities. It can hardly be argued that the information is held *for* the member universities. *Contra* TEX. ATT'Y GEN. ORD-142 (1976) (SWC Records held to be education records). The Defendants are not education agencies or institutions under the Buckley Amendment.

The Defendants are "educational institutions" under section 3(a)(14) if, among other things, "education is the primary function of the institution." TEX. ATT'Y GEN.

ORD-427 (1985) (*citing LaManna v. Electrical Workers Local Union No. 474*, 518 S.W.2d 348 (Tenn.1974)); ORD-142 (1976).

"*One* of the NCAA's avowed purposes is to maintain 'intercollegiate athletics as an integral part of the education program.'" NCAA Brief on Exceptions at 28 (*citing Justice v. National Collegiate Athletic Ass'n*, 577 F.Supp. 356, 361 (D.Ariz.1983)) (emphasis added). Defendant SWC would not dispute application of this premise to it. Defendants are basically non-profit service organizations which facilitate athletic competition between their member institutions. The educational benefits afforded students by the Defendants, if any, are collateral. Despite the NCAA's insistence that "it cannot be seriously controverted that the NCAA is an 'educational institution,'" the court cannot find that its primary function is education.

Even if the Court did find that Defendants were educational institutions, application of sections 3(a)(14) and 14(e) would not bar disclosure of the information in issue. The Court has previously ruled that the names of all students and all other facts be redacted from the information ordered disclosed. In ORD-165, the Attorney General considered whether a school district would disclose student discipline records. The issue was whether the information was "personally identfiable as to particuuar students so as to bring it within the restrictions of the Buckley Amendment." *Id.* The opinion noted that personally identifiable meant:

> (a) the name of a student, the student's parent or other family member, (b) the address of the student, (c) a personal identifier, such as the student's social

> security number or student number, (d) a list of personal characteristics which would make the student's identity easily traceable, or (e) other information which would make the student's identity easily traceable.

Id. Obviously, this information included that which would make the student's identity easily traceable. The Attorney General concluded that a workable compromise between individual privacy rights of students and the public's right to information about government agencies could be achieved by deletion of the personally identifying information. *Id.* (*citing Department of the Air Force v. Rose,* 425 U.S. 352, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976)). The opinion notes that section 14(e) does not require absolute certainty that a student's identity would never be discussed. *Id.*

This Court is of the opinion that the deletion of personally identifiable information as previously Ordered will adequately protect the privacy interests of the students identified in the information sought by Plaintiffs and Intervenors.

IV. CONCLUSION

The Court is of the opinion that deletion of the names of students, student-athletes, prospective student athletes and their family members, as well as all transcripts, phone numbers, bank account numbers, social security numbers, and geographical and biographical information about these individuals is required by section 3(a)(1) of the Act. Such information includes the name and location of a student's high school or its equivalent. Further, the Court finds that the attorney-client privilege excepts from dis-

closure NCAA document numbers 863, 865, 874, 875, 876 and 1815A. Those SWC documents which pertain to ongoing investigations, as designated by the SWC, shall not be disclosed.

The Court is of the opinion that sections 3(a)(8), 3(a)(11), 3(a)(14) and 14(e) will not bar disclosure of the remaining information in issue.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Plaintiffs' and Intervenors' applications for writ of mandamus are hereby GRANTED IN PART.

IT IS FURTHER ORDERED that Defendants redact from the information submitted for *in camera* inspection all information described above and make the redacted information requested available to Plaintiffs and Intervenors within sixty (60) days of the date of this Order.

The Clerk of this Court is hereby ORDERED to file all information submitted to this Court for *in camera* inspection as part of the record in these proceedings. The information shall remain under SEAL until further Order of this Court.

The Court would note that some of the documents Ordered released contain personal or sensitive information; consequently, the Court has some concern about their fair and legitimate use. The content of some of the very documents sought by Plaintiffs and Intervenors demonstrate an irresponsible, incomplete, and haphazard approach taken by the media in reporting college athletic events and recruitment. The Court cannot, and will not,

attempt to control the media's use of public information. The Court will, however, encourage *studied and responsible* use of such information. The rights and privileges guaranteed by the Constitution and laws of this country must be exercised responsibly if those rights are to endure.

(SEAL)

The Attorney General of Texas

December 30, 1983

JIM MATTOX
Attorney General

Mr. Robert J. Provan
General Counsel
Stephen F. Austin State University
Nacogdoches, Texas 75962

Opinion No. JM-116
Re: Whether the Gulf Star Conference is subject to the Open Meetings and Open Records Acts

Dear Mr. Provan:

You have informed us that Stephen F. Austin State University and five other universities are "engaged in the organization and establishment of a new intercollegiate athletic conference to be called the Gulf Star Conference." The proposed constitution of this conference states that one of the two general purposes of the conference is:

> [t]o form and maintain among universities of approximately the same size and comparable educational programs an athletic conference, the members of which shall incorporate intercollegiate athletics within their respective educational programs and shall place and maintain such athletics under the same administrative and academic control as that which obtains in their other educational programs.

You have asked whether this conference will be subject to the Open Meetings Act, article 6252-17, V.T.C.S., and to the Open Records Act, article 6252-17a, V.T.C.S.

Both acts apply to "governmental bodies." Section 1(c) of the Open Meetings Act defines a "governmental body" as:

> any board, commission, department, committee, or agency within the executive or legislative department of the state, which is under the direction of one or more elected or appointed members; and every Commissioners Court and city council in the state, and every deliberative body having rule-making or quasi-judicial power and classified as a department, agency, or political subdivision of a county or city; and the board of trustees of every school district, and every county board of school trustees and county board of education; and the governing board of every special district heretofore or hereafter created by law.

Section 2(1) of the Open Records Act defines a "governmental body" as:

> (A) any board, commission, department, committee, institution, agency, or office within the executive or legislative branch of the state government, or which is created by either the executive or legislative branch of the state government, and which is under the direction of one or more elected or appointed members;
>
> (B) the commissioners court of each county and the city council or governing body of each city in the state;
>
> (C) every deliberative body having rulemaking or quasi-judicial power and classified as a department, agency, or political subdivision of a county or city;
>
> (D) the board of trustees of every school district, and every county board of school trustees and county board of education;
>
> (E) the governing board of every special district;
>
> (F) the part, section, or portion of every organization, corporation, commission, committee, institution, or agency which is supported in whole or in part by public funds, or which expends public funds. Public funds as used herein shall mean funds of the State of Texas or any governmental subdivision thereof;

(G) the Judiciary is not included within this definition.

The conference will be a voluntary association of six institutions, three of which are in Louisiana. It is therefore not "within the executive or legislative department of the state." Thus, the only provision in the definition of "governmental body" contained in the Open Meetings Act that could conceivably apply to the conference is inapplicable. We therefore conclude that the proposed conference will not be subject to this act.

On the other hand, we conclude that the conference will be subject to the Open Records Act. You have informed us that each member university will pay an initial membership fee of $20,000 and then will pay $10,000 to the conference each year thereafter. Under section 2(1) of the Open Records Act, "governmental body" includes "the part, section, or portion of every organization . . . which is supported in whole or in part by public funds, or which expends public funds." Two prior Open Records Decisions have construed this provision. Open Records Decision No. 228 (1979) concluded that the North Texas Commission, "a private, nonprofit corporation chartered for the purpose of promoting the interests of the Dallas-Fort Worth metropolitan area," is a "governmental body" under this provision. The decision stated as follows:

> Under a sample contract submitted by the Commission, the City of Fort Worth was obligated to pay the Commission $80,000 a year for three years. The Commission also receives funds from several other units of government . . . [W]e have examined the contract in question here, and we do not believe it imposes a specific and definite obligation on the Commission to

provide a measurable amount of service in exchange for a certain amount of money as would be expected in a typical arms-length contract for services between a vendor and purchaser. Specifically, one provision of the contract purports to obligate the Commission to:

> (e) Continue its current successful programs and implement such new and innovative programs as will further its corporate objectives and common City's interests and activities.

Even if all other parts of the contract were found to represent a strictly arms-length transaction, we believe that this provision places the various governmental bodies which have entered into the contract in the position of 'supporting' the operation of the Commission with public funds within the meaning of section 2(1)(F) . . . . We are holding . . . that these records of the North Texas Commission are public under the Open Records Act since it receives funds from several public entities and has entered into contracts with these entities which result in at least a portion of the public funds paid to the Commission being used for the general support of the Commission rather than being attributable to specific payment for specific measurable services.

Relying upon Open Records Decision No. 228, Open Records Decision No. 302 (1982) held that the Brazos County Industrial Foundation is also a "governmental body." This decision held that the Foundation was "similar in many respects to the North Texas Commission." In 1980, it received an unrestricted grant of $48,000 from the city of Bryan. The decision stated that:

> Open Records Decision No. 228 (1979) held that the phrase 'supported in whole or in part by public funds' refers to any agreement between a political subdivision and any 'organization, corporation, commission, committee, institution, or agency' which transfers public

> funds from the political subdivision to such entity, but fails to '[impose] a specific and definite obligation on the [entity] to provide a measurable amount of service in exchange for a certain amount of money as would be expected in a typical arms-length contract for services between a vendor and purchaser.' This agreement failed to provide adequate consideration flowing to the political subdivision, and the public funds passing to such entity, although in the possession of private hands, retained their character as public funds.

We believe that the present situation is virtually identical to the situations with which these two decisions dealt. In our view, the member universities must be deemed to be in the position of "supporting" the athletic conference with public funds, because the funds that they will pay to the conference will be used for its "general support . . . rather than being attributable to specific payment for specific measurable services." Open Records Decision No. 228 (1979). Because the conference will be "supported . . . in part by public funds," it will be a "governmentaal body" subject to the Open Records Act.

SUMMARY

The proposed Gulf Star Conference will not be subject to the Open Meetings Act, article 6252-17, V.T.C.S., but will be subject to the Open Records Act, article 6252-17a, V.T.C.S.

Very truly yours,

/s/ Jim Mattox
JIM MATTOX

Attorney General of Texas

(SEAL)
THE ATTORNEY GENERAL
OF TEXAS

November 17, 1987

JIM MATTOX
ATTORNEY GENERAL

Honorable Mike Toomey
Chairman
Judiciary Committee
Texas House of
Representatives
P. O. Box 2910
Austin, Texas 78769

Opinion No. JM-821

Re: Whether a volunteer fire department is subject to the Open Records Act, article 6252-17a, V.T.C.S. (RQ-1225)

Dear Representative Toomey:

You ask whether a volunteer fire department that receives public funds through a contract with a rural fire prevention district constitutes a "governmental body" under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your concern focuses on the Cy-Fair Volunteer Fire Department, which you state is organized as a nonprofit corporation under Texas law. You indicate that the department receives public funds through a contract with the Harris County Rural Fire Prevention District No. 9 to perform fire fighting services in the district. At various times, members of the public have requested records from the district.

The Open Records Act applies to governmental bodies as defined in section 2 of the act. Section 2(1)(A) describes the state agencies covered by the act. Sections 2(1)(B)-(E) list specific types of local governing bodies or their subdivisions that are covered by the act. A volunteer fire department does not fall within any of these specific de-

scriptions. Section 2(1)(F) provides that a "governmental body" also includes

> the part, section, or portion of every organization, corporation, commission, committee, institution, or agency *which is supported in whole or in part by public funds, or which expends public funds.* Public funds as used herein shall mean funds of the State of Texas or any governmental subdivision thereof. (Emphasis added.)

Private nonprofit corporations can fall within this provision. *See, e.g.,* Open Records Decision Nos. 302 (1982); 228 (1979).

The primary issue in determining whether certain private entities are "governmental bodies" under the act is whether they are supported in whole or in part by public funds or whether they expend public funds. *See A.H. Belo Corporation v. Southern Methodist University,* 734 S.W.2d 720, 723 (Tex. App. - Dallas 1987, writ pending); Attorney General Opinions JM-154 (1984); JM-116 (1983); Open Records Decision Nos. 343, 302 (1982); 228 (1979); *see also Kneeland v. National Collegiate Athletic Association,* 650 F. Supp. 1047, 1056 (W.D. Tex. 1986); *cf.* Attorney General Opinions JM-596 (1986); JM-120 (1983). In *A. H. Belo Corporation v. Southern Methodist University, supra,* the court held that certain private schools' athletic departments are not "governmental bodies" under the Open Records Act because they did not receive public funds. The member schools, state and private, retained a predetermined amount of funds from gate receipts and from broadcasting fees. The remaining funds were forwarded to the Southwest Athletic Conference (SWC) and other schools. The SWC retained a predetermined amount and distributed

the rest to member schools. The court reasoned that the departments did not receive "public funds" within the meaning of section 2(1)(F) because the money distributed by the SWC did not constitute the "funds of the State of Texas or any governmental subdivision thereof." The court concluded that, because the funds never "vested" in any school, including a public school, the funds did not constitute "public funds." *See* 734 S.W.2d at 723.

The contract between the Cy-Fair Volunteer Fire Department and the Harris County Fire Prevention District No. 9, however, expressly involves a transfer to the department of the bulk of funds received by the district from its tax collections, less the district's administrative costs. In the *A.H. Belo* case, the court distinguished Open Records Decision No. 228 on the basis that it clearly involved public funds; funds transferred directly from a governmental body to the private entity in question. The case at hand is similar. Thus, this case is not one in which the governmental body acts only as a conduit for funds.

The receipt of public funds for the general support of the activities of a private organization brings that organization within the definition of a "governmental body." Open Records Decision No. 228. For example, in Open Records Decision No. 228, this office determined that a private, nonprofit corporation chartered to promote the interests of the Dallas-Fort Worth metropolitan area was a governmental body under the Open Records Act because of its contract with the city of Fort Worth. The contract did not impose "a specific and definite obligation on the commission to provide a measurable amount of service in

exchange for a certain amount of money as would be expected in a typical arms-length contract for services between a vendor and purchaser." Open Records Decision No. 228. The corporation was not simply a vendor or independent contractor who provided goods or services to a governmental body in an arms-length transaction. For these reasons, the decision determined that the contract funds were for the general support of the corporation rather than for specific measurable services. Consequently, the corporation was supported in part by public funds within the meaning of section 2(1)(F) of the Open Records Act. *Id.; see also* Attorney General Opinion JM-116 (1983); Open Records Decision No. 302 (1982).

In contrast, Open Records Decision No. 343 (1982) determined that a private, nonprofit corporation under contract with a hospital district to provide emergency medical service is not a "governmental body" because the applicable contract provided that the corporation should receive "each month a sum equal to the differences between cash receipts and approved operating expenditures of the ambulance service." The decision stated that this language imposed a definite obligation to make a "specific payment for specific measurable services" rather than to provide for general support. The decision did not indicate how the payment of monthly operating expenses through this formula constitutes payment for "specific measurable services" or how that payment can be distinguished from general monthly support. The "test" applied in Decision 343 is part of the test adopted and applied in Open Records Decision No. 228. The "test" was formulated in Decision No. 228, however, to help distin-

guish the "private" nonprofit corporation from a private vendor who sells goods or services to a governmental body. The "test" cannot be applied mechanically. The precise *manner* of funding is not the sole dispositive issue in determining whether an entity falls under the Open Records Act.

Other aspects of a contract or relationship involving the transfer of public funds between a private and public entity must be considered in determining whether a private entity is a "governmental body" under the Open Records Act. For example, a contract or relationship that involves public funds and that indicates a common purpose or objective or that creates an agency-type relationship[1] between a private entity and a public entity will bring the private entity within the section 2(1)(F) definition of a "governmental body." *See* Open Records Decision Nos. 302, 228; *see also Kneeland v. National oCllegiate Athletic Association, supra* (following Open Records Decision No. 228). For example, Open Records Decision No. 228 cited a provision of the contract which directed the private entity to continue to carry out the common objectives it held with the city. Structuring a contract that involves public funds to provide a formula to compute a fixed amount of money for a fixed period of time will not automatically prevent a private entity from constituting a "governmental body" under section 2(1)(F) of the

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1. It should be noted that the common purpose or agency-type relationship that will subject a "private" entity to the Open Records Act is not the equivalent of an agency relationship for purposes of tort liability. *See generally* Attorney General Opinion JM-748 (1987).

Open Records Act. The overall nature of the relationship created by the contract is relevant in determining whether the private entity is so closely associated with the governmental body that the private entity falls within the Open Records Act. As indicated, the precise *manner* of funding is not the sole dispositive issue in determining whether an entity falls under the Open Records Act. For this reason, the determination in Open Records Decision No. 343 with regard to a "governmental body" under the act should not be relied upon.[2]

Additionally, when volunteer fire departments contract with a political subdivision, considerations apply to them that ordinarily set them apart from private vendors of goods and services who typically deal with governmental bodies in arms-length transactions. Fire protection is one of the services traditionally provided by governmental bodies. *See City of Coleman v. Rhone*, 222 S.W.2d 646 (Tex. Civ. App.—Eastland 1949, writ ref'd). Although no statute expressly makes nonprofit volunteer fire departments subject to the Open Records Act or labels them governmental bodies for other purposes, several statutes recognize that they may have strong affiliations with public agencies. *See, e.g.*, V.T.C.S. art. 8309h, § 1(2)

---

2. Review of the contract at issue in Open Records Decision No. 343 reveals that the contract did not involve "a specific and definite obligation on the [entity] to provide a measurable amount of service in exchange for a certain amount of money as would be expected in a typical arms-length contract for services between a vendor and purchaser." *See* Open Records Decision No. 228 (1979). For example, the hospital district provided ambulances for the ambulance service and provided for the general monthly operating expenses of the service. The service could not make expenditures, including hiring personnel without district approval.

(political subdivisions may bring volunteer firefighters within workers compensation coverage); art. 6243e.3 (political subdivision may opt to provide relief and retirement benefits to volunteer firefighters); *see also* Tex. Const. art. III, § 51-d (legislature may provide benefits for survivors of members of volunteer fire departments killed in the performance of "official duties"). These considerations make it more likely that a nonprofit volunteer fire department that enters into a contract with a public entity will fall within the Open Records Act. Whether or not a particular nonprofit volunteer fire department falls within the Open Records Act depends on the circumstances in each case, including the terms of the contract between the department and the public entity. *See Schwartzman v. Merritt Island Volunteer Fire Department,* 352 So. 2d 1230 (Fla. App. - 4th Dist. 1977), *cert. denied,* 358 So.2d 132 (Fla. 1978) (cited in Open Records Decision No. 228 (1979)).

The contract between the Cy-Fair Volunteer Fire Department and the Harris County Rural Fire Prevention District No. 9 involves the general support of the activities of the department with public funds. The contract provides:

> The Department will provide the emergency ambulance services, the fire ~~prevention~~ services, the fire fighting services in the geographic District and *will not look to the District to provide any services whatsoever except for the providing of funds to enable the Department to carry on its duties and responsibilities.* (Emphasis added.)

Thus, the department receives public funds to provide all of the district's needed services. Additionally, the contract involves the submission by the department to the

district of one-year operating budgets and a three-year capital expenditure budget for planning purposes. The contract also provides for a form of continuing annual renewals. Consequently, the contract provides for the general support of the department for purposes of section 2(1)(F) of the Open Records Act.

As indicated, section 2(1)(F) covers only "the part, section, or portion" of corporations supported by public funds. *See* Open Records Decision No. 228. Accordingly the department must comply with the Open Records Act to the extent that it receives public funds from the district. Because the contract requires the department to maintain a separate accounting of the expenditure of funds received from the district, this "partial" coverage should not require undue delay in responding to requests for information under the Open Records Act.

SUMMARY

The Cy-Fair Volunteer Fire Department, a nonprofit corporation, is a "governmental body" within the meaning of section 2(1)(F) of the Texas Open Records Act, article 6252-17a, V.T.C.S., to the extent that it is supported by public funds received pursuant to its contract with the Harris County Rural Fire Prevention District No. 9.

Very truly yours,

/s/ Jim Mattox
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Attorney General of Texas

MARY KELLER
Executive Assistant Attorney General

Supreme Court, U.S.
FILED
DEC 23 1988
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CLERK

No. 88-884

In The

Supreme Court of the United States

October Term, 1988

CAROLE KNEELAND, BELO BROADCASTING CORP., A.H. BELO CORP. d/b/a THE DALLAS MORNING NEWS, THE TIMES HERALD PRINTING CO. and DAVID EDEN,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION and SOUTHWEST ATHLETIC CONFERENCE,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT OF THE CASE

Petitioners' Statement of the Case incorrectly denominates as "fact findings" certain items which are properly characterized as conclusions of law resulting from the application of legal principles and analysis to underlying

facts. Solely for the purposes of this Brief, Respondent accepts as true the remainder of Petitioners' Statement of the Case.

ARGUMENT

Rule 52(a) was Properly Applied in This Case

Petitioners' complaint about the Fifth Circuit's review is without merit. The reversal of the district court resulted from a disagreement with the ultimate determination, i.e., that Respondents are "governmental bodies" under the Texas Open Records Act, Tex. Rev. Civ. Stat. Ann. art. 6252-17a (Vernon Supp. 1989) (the "Texas Act"). The Fifth Circuit has *plenary* power to review that holding and is not restricted to the "clearly erroneous" standard of Rule 52(a).

The Fifth Circuit did *not* disagree with the district court's findings of the subsidiary, historical facts that formed the basis of the court's ultimate conclusion. The only "facts" necessary to determine whether Respondents are subject to the Texas Act were (i) the source and amount of funds paid to Respondents, and (ii) the services provided by Respondents in return for such funds. The court of appeals thoroughly reviewed the fact findings on these points under the appropriate standard.

Petitioners improperly characterize as "fact findings" the legal determinations of whether Respondents (i) "provide measurable services in return for a certain amount of money," and (ii) "are supported in part by public funds of the State of Texas." (Petition at 5-6) These rulings

are actually "conclusions" resulting from the application of legal tests and factors to the above-mentioned "facts." *See Kneeland v. NCAA*, 850 F.2d 224, 228-31 (5th Cir. 1988) (applying Texas Attorney General's "patterns of analysis to the facts at bar").

Courts of appeals are *not* bound by the limits of Rule 52(a) "when making an independent determination as to the legal conclusions and inferences which should be drawn from [findings of fact]." *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961). *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984); *United States v. Grayson County State Bank*, 656 F.2d 1070, 1075 (5th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982). "It is axiomatic that the scope of review of the legal effect given to accepted facts is much broader than the clearly erroneous standard." *Western Beef, Inc. v. Compton Inv. Co.*, 611 F.2d 587, 590 (5th Cir. 1980).

The propriety of the Fifth Circuit's review in this case is demonstrated by the analogous review in *United States v. Winthrop*, 417 F.2d 905 (5th Cir. 1969). The sole issue in *Winthrop* was whether profits from the sale of subdivided real estate constituted capital gains or ordinary income for income tax purposes. *Id.* at 906. The Fifth Circuit conducted an ad hoc review of the underlying facts and held that the district court had improperly concluded that the taxpayer's profits constituted ordinary income. In discussing the scope of its review, the court recognized that "even though we accept as true the fact findings of the court below, it is nevertheless incumbent upon this court to inquire into the ultimate conclusion

of law reached by that court." *Id.* at 910. To that end, the court noted that

> the district court's finding on this ultimate issue, however, is not to be garrisoned by the clearly erroneous rule. Though it has factual underpinnings this ultimate issue is inherently a question of law. Obeisance to the clearly erroneous rule must yield when the facts are undisputed and we are called upon to reason and interpret. This is the law obligation of the court as distinguished from its fact finding duties.

Id. See Radio WHKW, Inc. v. Yarber, 838 F.2d 1439, 1442 (5th Cir. 1988); *Armstead v. Maggio*, 720 F.2d 894, 896 (5th Cir. 1983); *American Nat'l Bank v. United States*, 421 F.2d 442, 450-51 (5th Cir.), *cert. denied*, 400 U.S. 819 (1970).

The district court's rulings in the case at bar with which the court of appeals disagreed were conclusions derived from legal analysis of essentially undisputed facts. The court of appeals simply subjected the district court's analysis to plenary review to ensure that that court's understanding and application of the law was proper. The Fifth Circuit's review was correct. It was conducted pursuant to the proper standard.

The Court of Appeals Correctly Reviewed and Applied Texas Law

Petitioners' claim that the court of appeals incorrectly applied Texas Attorney General opinions to the facts of this case, thereby violating 28 U.S.C. § 1652, is inherently flawed. That statute simply requires federal courts to regard "[t]he laws of the several states . . . as rules of decision . . . in cases where they apply." 28 U.S.C.

§ 1652. The attorney general opinions at issue, however, are *not* "controlling substantive state law" or "dispositive Texas jurisprudence" as argued by Petitioners. (Petition at 9-10) *See Shore v. Howard,* 414 F. Supp. 379, 390 (N.D. Tex. 1976) (Texas Attorney General opinions are persuasive, but "do not carry the decisive weight of caselaw"). Even the district court in this case recognized that these "opinions" are not conclusive authority. *Kneeland v. NCAA,* 650 F. Supp. 1047, 1056 n.3 (W.D. Tex. 1986), (citing *City of Houston v. Houston Chronicle Publishing Co.,* 673 S.W.2d 316 (Tex. Civ. App.—Houston [1st Dist.] 1984, no writ); *Smith v. McCoy,* 533 S.W.2d 457 (Tex. Civ. App.—Dallas 1976, writ dism'd)), *rev'd,* 850 F.2d 224 (5th Cir. 1988).

The Fifth Circuit "closely examined" the attorney general opinions and sought guidance from them. *Kneeland,* 850 F.2d at 228. The court, however, was not bound by the opinions and was free to interpret or reject the opinions as it would any other nonconclusive authority. As the court of appeals noted (in a passage from which Petitioners conveniently quoted only favorable language), "[w]e find helpful signs, albeit mixed signals, in the opinions which generally are fact-specific." *Id.* The nature of reliance placed upon the opinions is further evidenced by the Fifth Circuit's notations that the opinions merely "advise" and "inform"—the opinions are *not* binding, controlling, or dispositive. *Id. See Tahoe Regional Planning Agency v. McKay,* 769 F.2d 534, 539 (9th Cir. 1985) (Nevada Attorney General opinions are not binding); *Mogis v. Lyman-Richey Sand & Gravel Corp.,* 189 F.2d 130, 139-40 (8th Cir.) (Nebraska Attorney General opinion is neither legal precedent nor judicial decision, and "has

no controlling authority upon the state of the law discussed in it"), *cert. denied*, 342 U.S. 877 (1951).

There is no need to dissect the attorney general opinions reviewed by the court of appeals. The opinions were relied upon by the court to the extent it deemed necessary for guidance. Petitioners may disagree with the court's decision, but their complaint as to how the court reached that decision is without merit.

CONCLUSION

For the foregoing reasons, the writ of certiorari should not issue in this action.

Respectfully submitted,

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(3)

No. 88-884

CAROLE KNEELAND, BELO BROADCASTING CORP., A.H. BELO CORP. d/b/a THE DALLAS MORNING NEWS, THE TIMES HERALD PRINTING CO. and DAVID EDEN,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE FOR THE STATE OF TEXAS IN SUPPORT OF PETITIONERS

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December 23, 1988

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INTEREST OF AMICUS CURIAE

The Attorney General of the *amicus curiae* State of Texas submits this brief, pursuant to Supreme Court Rule 36.4, to bring to the attention of the Court an issue of importance to the people of Texas. This case affects all members of the public in Texas, not just the immediate parties to the case.

The central issue in *Kneeland v. NCAA*, 850 F.2d 224 (5th Cir. 1988), the decision from which Petitioners seek a writ of certiorari, is one of state law. In *Kneeland v. NCAA*, 650 F. Supp. 1047, 1057-63 (W.D. Tex. 1986), the district court applied Texas Attorney General opinions and held that the Texas Open Records Act, TEX. REV. CIV. STAT. ANN. art. 6252-17a, applies to the National Collegiate Athletic Association (NCAA) and the Southwest Athletic Conference (SWC). In *Kneeland v. NCAA*, 850 F.2d 224, 226-28, the Fifth Circuit reversed the judgment of the district court. In reversing the district court, the Fifth Circuit relied on an open records decision that the Texas Attorney General had overruled. *Kneeland v. NCAA*, 850 F.2d 224, 229 (5th Cir. 1988) (citing TEX. ATT'Y GEN. ORD No. 343 (1982), overruled in TEX. ATT'Y GEN. OP. No. JM-821 (1987)). Further, the Fifth Circuit failed to acknowledge the impact of the most recent Attorney General's opinion on point, TEX. ATT'Y GEN. OP. No. JM-821 (1987).

Although the Texas Attorney General is not compelled to follow the Fifth Circuit's interpretation of Texas law, other cases involving the Texas Open Records Act may be removed to federal court, as was this case. Parties in federal courts in Texas should not be subject to an interpretation of state law that differs

from the interpretation applied by the Texas Attorney General and by Texas courts.

The Fifth Circuit's application and discussion of state law in *Kneeland v. NCAA* undermines the Attorney General's open records process. The Texas Open Records Act requires governmental bodies to request a decision from the Texas Attorney General. TEX. REV. CIV. STAT. ANN. art. 6252-17a, sec. 7(a). The Attorney General can enforce open records decisions by seeking a writ of mandamus. Art. 6252-17a, sec. 8.

Commentators recognize the advantages of Texas' procedural scheme. The Texas Legislature's delegation to the Attorney General of this quasi-judicial responsibility has been deemed "the most innovative feature" of the Act. *The Texas Open Records Act: A Section by Section Analysis,* 14 Hous. L. Rev. 398, 429 (1977). A comprehensive 1975 study of the forty state open records acts then in effect found that expense and delay incurred by citizens in seeking judicial review of a governmental body's decision to deny access to public records was one of the greatest weaknesses in many state open records acts. *Project, Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971, 1183 (1975) (Michigan Project). The Michigan Project observed that the Texas procedure for delegating to the Attorney General the initial authority to make a determination of the issue "alleviate[s] the cost problem most effectively." *Id.* A survey of the one hundred forty-eight open records decisions issued by the Texas Attorney General prior to January 1, 1977, found that governmental bodies refused to follow the Attorney General's ruling on only three occasions. *The Texas Open Records Act: A Section by Section Analysis*, 14 Hous. L. Rev. 398, at 430. Because most governmental bodies seek the Attorney General's open records

decisions and abide by them, the quasi-judicial procedure is effective. The federal courts' failure to follow the Attorney General's open records decisions would undermine the effectiveness of this system.

Only a definitive statement from this Court determining whether the Fifth Circuit applied Texas law, consistent with federal statutory directives, can remove the cloud of uncertainty that now shadows the overall effectiveness of the Texas Attorney General's open records decisions and the validity of several specific open records decisions.

SUMMARY OF ARGUMENT

The Court of Appeals in *Kneeland v. NCAA*, 850 F.2d 224 (5th Cir. 1988), failed to follow 28 U.S.C. sec. 1652, which requires federal courts to apply substantive state law to pendent state claims. Although the Court of Appeals acknowledged that, absent state court decisions, it must "examine" the opinions of the Texas Attorney General, *Kneeland v. NCAA*, 850 F.2d at 228, the Court of Appeals failed to give effect to those opinions. The Court of Appeals relied in part on TEX. ATT'Y GEN. ORD No. 343 (1982), a decision overruled in TEX. ATT'Y GEN. OP. No. JM-821 (1987). Further, the Court of Appeals failed to give effect to the holding in Opinion JM-821. In overruling ORD No. 343, Opinion JM-821 cautioned against a mechanical application of the language articulated in specific earlier open records decisions and indicated that the totality of circumstances and the language of the Open Records Act controls whether an entity constitutes a governmental body subject to the Open Records Act.

ARGUMENT

I. Absent Contrary State Law, the Fifth Circuit must follow applicable Attorney General Open Records Decisions.

The Court of Appeals failed to follow 28 U.S.C. sec. 1652, which provides:

> The Laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. sec. 1652.

Federal courts must apply substantive state law to pendent state claims. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Absent state court decisions, the federal courts must resolve the issue as the forum state's courts would. *Lehman Brothers v. Schein*, 416 U.S. 386, 390-91 (1984); *see Tompkins v. City of El Paso*, 449 F.2d 842, 844 (5th Cir. 1971). The federal courts must attempt to apply the law not as the federal court would apply it but as the state courts would apply it, using the sources the state courts would use. *See id.*

Although Attorney General opinions and open records decisions do not have precedential value in Texas courts, they are ordinarily accorded "great weight" by the courts. *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 322 (Tex. App. - Houston [1st Dist] 1984, no writ); *see, e.g., Industrial Foundation of the South v. Texas Industrial*

Accident Board, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). When the Attorney General is charged with the duty of interpreting a statute and persons rely on the Attorney General's opinion, a court will not ordinarily give the statute a different meaning unless the Attorney General's opinion is clearly wrong. *See Thomas v. Groebl*, 212 S.W.2d 625, 635 (Tex. 1948). This is similar to the deference accorded to the interpretation of statutes formulated by the administrative agencies responsible for enforcing the statutes.

Because the Texas courts accord Attorney General's opinions and open records decisions the presumption of validity, in predicting how the Texas courts would apply the Open Records Act to the NCAA and the SWC, the Court of Appeals must apply Attorney General's opinions and open records decisions. Absent contrary state court decisions, Attorney General's opinions and open records decisions constitute state law for purposes of 28 U.S.C. sec. 1652.

The Court of Appeals acknowledged that it must "examine" Attorney General opinions and open records decisions:

> The usual deference paid to formal opinions of state attorneys general is accentuated in this case because the Texas Legislature has formally invited its Attorney General to interpret the Act when asked to do so.... Finding no dispositive Texas jurisprudence on this issue, we closely examine the opinions of the Texas Attorney General.

Kneeland v. NCAA, 850 F.2d 224, 228 (5th Cir. 1988). Despite this statement, however, the Court of Appeals

failed to follow Attorney General opinions and open records decisions.

II. The Fifth Circuit failed to follow applicable Attorney General Decisions interpreting the Texas Open Records Act.

The Texas Open Records Act, TEX REV. CIV. STAT. ANN. art. 6252-17a, (Act), applies to an entity if the entity constitutes a "governmental body," which includes:

> the part, section, or portion of every organization, corporation, commission, committee, institution, or agency which is supported in whole or in part by public funds, or which expends public funds. Public funds as used herein shall mean funds of the state of Texas or any governmental subdivision thereof;

Art. 6252-17a, sec. 2(1)(F). The dispositive issue in determining whether specific entities fall within this section is whether they are supported in whole or in part by public funds or whether they expend public funds. *A.H. Belo Corporation v. Southern Methodist University*, 734 S.W.2d 720, 723 (Tex. App. - Dallas 1987, writ denied); TEX. ATT'Y GEN. OP. No. JM-821 (1987).

In TEX. ATT'Y GEN. OP. No. JM-821, the Attorney General surveyed prior opinions in depth to determine the reach of section 2(1)(F) and applied the section to a new fact situation not previously encountered. The seminal decision under section 2(1)(F), TEX. ATT'Y GEN. ORD No. 228 (1979), applied section 2(1)(F) to a specific, narrow situation where one

contract defined the relationship between a private non-profit corporation and the city of Fort Worth. Decision No. 228 determined that the Act applied to the corporation because its contract with the city did not impose "a specific and definite obligation on the commission to provide a measurable amount of service in exchange for a certain amount of money as would be expected in a typical arms-length contract for services between a vendor and purchaser." This measurable services "test" is one means of determining whether an entity is supported by public funds or whether it simply sells goods or services to a governmental entity. The "test" is not simply a question of law; it depends on the facts in specific cases and cannot be applied mechanically. The district court apparently applied this "test" to the facts presented to it.

In TEX. ATT'Y GEN. OP. No. JM-821 (1987), the Attorney General also examined TEX. ATT'Y GEN. ORD No. 343 (1982), which determined that a private, non-profit corporation under contract with a hospital district to provide emergency medical service is not a "governmental body" because the applicable contract provided that the corporation should receive "each month a sum equal to the differences between cash receipts and approved operating expenditures of the ambulance service." Opinion JM-821 held that, on reconsideration, Decision No. 343 had applied the "measurable amount of service. . .in exchange for a certain amount of money" "test" mechanically. Opinion JM-821 therefore overruled Decision No. 343. The Court of Appeals relied on Decision No. 343 in *Kneeland v. NCAA*, 850 F.2d 224, 229 (5th Cir. 1988) (citing TEX. ATT'Y GEN. ORD No. 343 (1982), overruled in TEX. ATT'Y GEN. OP. No. JM-821 (1987)).

The Court of Appeals applied to the NCAA and the SWC the language originally articulated in ORD No. 228, the "measurable services" language, to apply to a specific, narrow fact situation -- an arms-length vendor-vendee relationship evidenced by a contract. The facts surrounding the relationship between the NCAA and the SWC on the one hand and Texas public colleges and universities on the other hand differ significantly.[1] In applying language applicable only in a narrow vendor-vendee situation to the NCAA and the SWC, the Court of Appeals failed to give effect to Opinion JM-821 (1987).

III. Applicable Attorney General Open Records Decisions require application of the language of the Open Records Act, not just the language of one Open Records Decision.

Further, TEX. ATT'Y GEN. OP. No. JM-821 announced a new "test" by stating that the terms of a contract will not alone control. The totality of circumstances and the language of the Open Records Act itself necessarily control whether an entity is supported in whole or part by or expends public funds. The nature of the function performed by the entity and its relationship with a governmental body are also relevant to whether an entity is supported by or expends public funds. The "test" first announced in

[1]The Court of Appeals did not clearly distinguish the Attorney General's application, in TEX. ATT'Y GEN. OP. No. JM-116 (1983), of the "measurable services" language to the Gulf Star Athletic Conference. The facts in JM-116 are more like those surrounding the relationship between the NCAA and the SWC and public universities than the facts in either TEX. ATT'Y GEN. ORD No. 228 (1879) or TEX. ATT'Y GEN. ORD No. 343 (1982) (overruled in TEX. ATT'Y GEN. OP. No. JM-821 (1987)).

TEX. ATT'Y GEN. ORD No. 228 is but one means of determining whether an entity has an arms-length relationship with a governmental body or whether it is supported in part by or expends public funds. The language drawn from ORD No. 228 cannot override the language of the Open Records Act itself.

The Court of Appeals failed to give effect to the express language of the Texas Open Records Act that applies the Act to entities either that are supported in whole or in part by public funds *or* that *expend* public funds. TEX. REV. CIV. STAT. ANN. art. 6252-17a, sec. 2(1)(F); *see A.H. Belo Corp. v. Southern Methodist University*, 734 S.W. 2d 720, 723 (Tex. App. - Dallas 1987, writ denied). Although the Court of Appeals upheld the district court's finding that the NCAA and the SWC receive Texas public funds, *Kneeland v. NCAA*, 850 F.2d 224, 226-28 (5th Cir. 1988), the Court of Appeals failed to address whether the NCAA and the SWC expend these funds. The Fifth Circuit considered only the issue of support under section 2(1)(F).

CONCLUSION

A writ of certiorari should issue to review the judgment of the Court of Appeals for the Fifth Circuit to determine whether the Court of Appeals followed 28 U.S.C.sec. 1652 and applied state law to Petitioners' pendent claims.

Respectfully submitted,

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No. 88-884

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In The

Supreme Court of the United States

October Term, 1988

CAROLE KNEELAND, BELO BROADCASTING CORP., A.H. BELO CORP. d/b/a THE DALLAS MORNING NEWS, THE TIMES HERALD PRINTING CO. and DAVID EDEN,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION and SOUTHWEST ATHLETIC CONFERENCE,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals' decision that the NCAA is not subject to the Texas Open Records Act is contrary to any fact finding of the district court; and if so, whether the court of appeals applied the standard of review set out in Rule 52(a) of the Federal Rules of Civil Procedure.

2. Whether the court of appeals followed Texas law in construing the Texas Open Records Act.

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No. 88-884

In The

Supreme Court of the United States

October Term, 1988

CAROLE KNEELAND, BELO BROADCASTING CORP., A.H. BELO CORP. d/b/a THE DALLAS MORNING NEWS, THE TIMES HERALD PRINTING CO. and DAVID EDEN,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION and SOUTHWEST ATHLETIC CONFERENCE,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

Petitioners' Statement of the Case contains a number of inaccuracies. They imply in their Statement of the Case,

and their first point of error asserts, that the district court made findings as to contested issues of material fact that were subsequently rejected by the court of appeals. To the contrary, the court of appeals considered it necessary to review only one of the district court's fact findings, and determined that such finding survived scrutiny under Rule 52(a). The court of appeals simply reached a legal conclusion different from that of the district court as to the proper construction of the Texas Open Records Act, Tex. Rev. Civ. Stat. Ann. art. 6252-17a (Vernon's Supp. 1989) (the "Act").

The remainder of Petitioners' inaccuracies reflect their efforts to minimize the broad sweep of the district court's opinion in this case. For example, they state that they sought NCAA records concerning only Texas member schools. The district court's order, however, requires disclosure under the Texas Act of the internal records of a national organization pertaining to both public and private institutions in Texas, and even to institutions outside the State (the University of Arkansas). Also, Petitioners imply that the district court ordered disclosure of only a few of the NCAA's records. Literally thousands of documents were brought from the NCAA's headquarters in Kansas, where they are generated and maintained, and were submitted for *in camera* inspection; the district court ordered disclosure of some portion of all but six of these.[1]

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[1] In addition, Petitioners grossly overstate the amount of funds the NCAA receives from its Texas members, both public and private. They allege that the NCAA receives "hundreds of thousands of dollars" from them, when in fact the NCAA received $21,000.00 in dues during 1984-85 and $63,960.00 in television revenue assessments in 1981-85 from Texas member schools. (Stipulated in pretrial order p. 19; Pl. Ex. 18)

Petitioners also imply that the construction of the Act they advocate is endorsed by the Texas Attorney General. Instead, the Attorney General became involved in these proceedings merely to obtain a "clarification of the Panel's analysis." Supplemental Motion for Leave to File Brief as Amicus Curiae. He did not contend that the court of appeals reached the wrong result or that the NCAA is subject to the Texas Act. Rather, he "emphasize[d] that [he had] not reviewed the specific facts of this case and [did] not comment on the result of this case."[2] *Id.*

ARGUMENT

I.

No Special or Important Considerations Have Been Advanced That Would Warrant Review of This Case

This case remains in federal court due to pendent jurisdiction. At present, it concerns only the proper inter pretation of a state statute. The court of appeals considered all existing Texas authorities and reached a correct result. There is no issue meriting the attention of this Court.

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[2] Indeed, the Attorney General has cited authoritatively the court of appeals' opinion in Tex. Atty. Gen. ORD-510 (1988). In his Amicus brief, the Attorney General simply requested that the court of appeals state more clearly that a "mechanical test" should not be applied and that *each* of the factors the court considered in this case are equally important in determining whether an organization is a "governmental body." Having considered all of those factors in this case, the court of appeals apparently saw no need for a clarification of the language of its opinion.

Construction of the pertinent provisions of a state statute, especially where as here no Texas appellate court has done so, does not present any special or important consideration that would warrant review pursuant to Supreme Court Rule 17. As this Court stated in *Huddleston v. Dwyer*, 322 U.S. 232 (1944), "ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Id.* at 237. No "exceptional case" is presented here.

Moreover, as discussed below, the court of appeals correctly decided the case.

II.

Rule 52(a) Was Properly Applied In This Case

Petitioners incorrectly contend that the court of appeals failed to apply Rule 52(a) of the Federal Rules of Civil Procedure in deciding this case. To the contrary, the court of appeals expressly applied the "clearly erroneous" standard in reviewing the district court's factual determinations. *See Kneeland v. National Collegiate Athletic Ass'n*, 850 F.2d 224, 227 (1988) (district court's factual finding that Enforcement Division funds came from three revenue sources withstood clearly erroneous challenge). That court did not purport to overturn any fact finding of the district court.

The conclusion about which Petitioners complain is one of law, not of fact. The Act applies to each "governmental body" of the State of Texas, which includes the part of any organization that is "supported" by public funds of the state. *See* Section 2(1)(F) of the Act. The

nature of the financial relationship between Texas' public universities and the NCAA has never been disputed in this case. Whether these uncontested facts constitute "support" within the meaning of the statute is a pure issue of law, and the courts below treated it as such.

The court of appeals discerned from the Attorney General opinions on the subject three criteria used in determining whether a given private organization is subject to the Act. According to the Attorney General, a private organization may be deemed a "governmental body" if (i) it is not legally obligated to provide a "measurable" amount of service in exchange for a certain amount of money, as would be expected in a typical arms-length contract for services, (ii) the relationship between the organization and the government is closely intertwined so that they pursue a common purpose or maintain an agency type relationship, and (iii) the organization provides services traditionally performed by Texas government.[3] *E.g.*, Tex. Atty. Gen. JM-821 (1988).

In applying these criteria to the NCAA, neither the court of appeals nor the district court was forced to decide disputed fact issues. The purpose and function of the NCAA and its relationship with its member institutions is set out in the NCAA's constitution, by-laws, and regulations and was not controverted at trial. (Pl. Ex. 13) Similarly, the nature of the services rendered by the NCAA for the different sources of funds it receives from

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[3] The analysis used by the Attorney General in determining whether an organization constitutes a "governmental body" is strikingly similar to this Court's analysis concerning whether an organization is a "state actor." *E.g., Rendall-Baker v. Kohn,* 457 U.S. 830 (1981).

Texas public member institutions are specifically delineated in the NCAA by-laws and not disputed in this case.[4] (*Id.*)

Based on the uncontested facts, the court of appeals concluded that the NCAA was not "supported" by public funds and was not a "governmental body" within the meaning of the Act. It does not perform traditional government functions (*Kneeland*, 850 F.2d at 229), there is no closely intertwined relationship or real identity of interest between it and its Texas public members (*Id.*), and the services provided by the NCAA are measurable as would be expected in an arms-length transaction (*Id.* at 230). Consideration of *all* of the criteria for determining whether an organization is a "governmental body" weighed heavily towards excluding the NCAA from the reach of the Act. The determinations made as to each criteria and the process of weighing them were simply conclusions of law based upon undisputed facts. Thus, in construing the extent of the Act's reach, the court of appeals was not required to, and did not, override any fact findings of the district court.

For this reason, this case is unlike *Anderson v. City of Bessemer*, 470 U.S. 564 (1985), upon which Petitioners rely. There, the court of appeals reviewed a purely factual

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[4] Moreover, in addition to the services set out in the court of appeals' opinion, the regulations of the NCAA provide that the NCAA pays a percentage of the receipts from NCAA championship events to the member institution that provides facilities and services in hosting the championship event, and provides for significant financial benefits to schools participating in the events. (P1. Ex. 13)

matter: whether the petitioner had been denied employment on account of her sex. The court of appeals in this case, on the other hand, disagreed with the district court's conclusion of law that the Texas Legislature intended to include organizations such as the NCAA within the Act's scope. *E.g., United States v. General Motors Corp.*, 384 U.S. 127 (1966). Rule 52(a) simply does not apply in connection with the review of that conclusion.

Even assuming, however, that Rule 52(a) applies to the Fifth Circuit's review of the district court's conclusion as to the intended scope of the Act, the standard set out in that Rule was clearly surpassed. Rule 52(a) provides that a finding of fact shall not be set aside unless it is "clearly erroneous" – *i.e.*, the appellate court "is left with a definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). A fair reading of the Fifth Circuit's opinion and analysis unmistakably reveals that it was "definitely and firmly convinced" that the district court erred in concluding that the NCAA was subject to the Act. Furthermore, as discussed below, that conclusion based upon the undisputed facts was correct. Thus, whether the court of appeals' conclusion concerning the scope of the Act is characterized as a factual or legal determination, no error was committed in the context of Rule 52(a).

III.

The Court of Appeals Correctly Applied Texas Law

This Court has recently determined that the NCAA remains a private institution even when it threatens sanctions against a state institution. *NCAA v. Tarkanian*, 57

U.S.L.W. 4050 (U.S. Dec. 12, 1988). It is equally important to maintain the character of the NCAA as a private actor in its basic financial relations with its members, as the court of appeals recognized in this case.[5] Otherwise, this nationwide organization would find itself exposed to a welter of competing and possibly conflicting state open records laws. The district court's broad reading of the Act thus raises a host of difficult constitutional and choice of law issues about the permissible reach of state legislative powers.[6] There is no reason to decide such issues in this case.

The court of appeals correctly interpreted Texas law in determining that the NCAA was not "supported" by public funds, and thus was beyond the Act's coverage. Under *Erie*, its duty was to predict how the Supreme Court of Texas would construe the Act. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967). No Texas appellate court has construed the term "support." The Texas Attorney General, whose decisions are not binding on the courts (*Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App. – Houston 1984, writ ref'd n.r.e.)), is the only

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[5] If the NCAA is a "governmental body" of Texas for purposes of the Act because of its financial relations with the state, perhaps the NCAA and the state are joint actors for the purposes of the Fourteenth Amendment. Any such conclusion would sweep all NCAA activity into the public sector. *Tarkanian* clearly rejects any such position; not even the dissenting Justices took so broad a view.

[6] The NCAA on appeal raised the issues of whether the Act was intended to apply extra-territorially to internal records of the NCAA generated and maintained at its headquarters in Mission, Kansas; whether if it was so intended, it could constitutionally apply; and whether under choice of law principles the Act was applicable. It was not necessary for the court of appeals to reach any of these issues.

authority of record that has done so in any context. The Attorney General, however, has never interpreted the term "governmental body" in the context of a nationwide organization situated out of state such as the NCAA, or considered the lurking issues of the reach of state power that this question presents.

Moreover, as the court of appeals noted, the Attorney General in his opinions displays some confusion as to what organizations the Legislature intended to cover under the Act. Nevertheless, the court of appeals derived from those opinions a sensible analysis which it applied in this case.

In arguing that the court of appeals did not follow Texas law, Petitioners principally quibble over whether the court of appeals relied in part on one Texas Attorney General's opinion (ORD-343) that they urge had been subsequently overruled in another opinion (JM-821). Yet, the court of appeals did not rely solely on ORD-343 in interpreting the Act, but considered several Attorney General opinions, including JM-821.[7]

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[7] As the court of appeals noted in its opinion, the analysis contained in ORD-343 of one of the factors to be used in determining whether an organization is a "governmental body" under the Act was not overruled in JM-821. Rather, the Attorney General in JM-821 simply found that the determination of what constitutes a governmental body under the Act should not turn on the manner of payment to an organization

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Based on its considered review of all of the pertinent Attorney General opinions, the court of appeals concluded that the NCAA is not subject to the Act. That court recognized that the NCAA pursues no traditional function of Texas government. And, it is contractually obligated to render many valuable services and to grant significant benefits, including substantial financial ones, in exchange for the relatively insignificant amount of funds it receives from its Texas members. Moreover, the relationship between the NCAA and its Texas member institutions is necessarily arms-length because of the investigative function it performs. Its Texas member schools do not exercise control over the NCAA's activities, nor is it an agent for them.[8] Thus, consideration of the factors enunciated by the Attorney General in his opinions clearly dictate, as held by the Fifth Circuit in this case, that the NCAA is not a "governmental body".

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alone, which was controlling in ORD-343. Rather, other factors, such as the relationship between the organization and the government, should also be considered. Thus, JM-821 called into question the result reached in ORD-343 in that the existence of certain facts not considered when the opinion was rendered, such as the relationship between the organization involved in that opinion and the government, might change the result. The analysis in ORD-343 pertaining to whether the organization performed specific and measurable services in exchange for the funds it received, which was one of the analyses considered by the court of appeals, was not rejected in JM-821. That determination simply does not end the inquiry, as the court of appeals correctly recognized in this case.

[8] As the Court recognized in *Tarkanian*, the NCAA's relations with a state institution that is under investigation are essentially adversarial.

The Fifth Circuit's approach and decision in this case is not only consistent with Attorney General opinions but is also fully in accord with the Texas Legislature's Declaration of Policy set forth in the Act.[9] The Act was designed to make available to the public information concerning the affairs of Texas government and the conduct of the public officials of the state, to whom the citizens have delegated governmental authority (including the right to manage and expend public funds) so that the public may retain control over the instruments they have created and "may police the actions of their government." *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 676 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Plainly, the Texas Legislature did not intend that the Act reach organizations such as the NCAA. The NCAA,

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[9] According to the Legislature, the Act was passed:

> "[p]ursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, [and because the public is] entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."

Tex. Rev. Civ. Stat. Ann. art. 6252-17a § 1 (Vernon Supp. 1989).

which maintains its headquarters in Mission, Kansas, and is comprised of 900 member institutions located in all fifty states, is neither an instrumentality created by the citizens of Texas nor a repository of delegated governmental authority. Every available Texas resource indicates that the Act was designed to apply only to Texas governmental agencies and those nominally private organizations that are controlled by subdivisions of state government and perform traditional governmental functions. The Fifth Circuit's decision in this case was correct and comports with Texas law.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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